FAIR CREDIT BILLING ACT AMENDMENTS OF 1975

P89-81

HEARING

BEFORE THE

SUBCOMMITTEE ON CONSUMER AFFAIRS

OF THE

COMMITTEE ON BANKING, CURRENCY AND HOUSING HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

H.R. 10209

A BILL TO AMEND THE FAIR CREDIT BILLING ACT (PUBLIC LAW 93-495) WITH RESPECT TO THE USE OF CASH DISCOUNTS, AND FOR OTHER PURPOSES

OCTOBER 23, 1975

Printed for the use of the
Committee on Banking, Currency and Housing

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THE FAIR CREDIT BILLING ACT AMENDMENTS OF 1975

THURSDAY, OCTOBER 23, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CONSUMER AFFAIRS OF THE
COMMITTEE ON BANKING, CURRENCY AND HOUSING,
Washington, D.C.

The subcommittee met at 9:30 a.m. in room 2222, Rayburn House Office Building, Hon. Frank Annunzio (chairman of the subcommittee) presiding.

Present: Representatives Annunzio, Spellman, Barrett, Fauntroy, Wylie, Fenwick and Grassley.

Mr. ANNUNZIO. The meeting of the Consumer Affairs Subcommittee will come to order.

It is 9:30, and we have three members of the subcommittee present; Mr. Barrett, Mrs. Fenwick, and myself, and I am deeply grateful for your attendance.

I want to also make another statement this morning, that when we complete all of these hearings and we go into the debt collection bill, the chairman is prepared to hold hearings with the District members if they so desire. And I will come to your particular districts.

This morning the subcommitte is meeting to consider H.R. 10209, the Fair Credit Billing Act Amendments of 1975. I don't want there to be any misunderstanding of what this bill will do: It will outlaw surcharges on credit cards.

I favor this legislation because surcharges on credit cards, now being proposed in the Senate, would put a terrible burden on million of consumers. There are an estimated 500 million credit cards in circulation. Credit cards account for $28.2 billion in outstanding credit. These proposed surcharges could cost consumers over a billion dollars a year.

Unless we prevent these extra charges, the credit card could become the most expensive piece of plastic in history.

Let me illustrate how a surcharge works. If an item now has a regular price of $10, under a surcharge of a credit card customer would pay $10.50, and a cash customer the regular $10 price. As you can tell, the credit card customer has been penalized. The cash customer who was intended to benefit from a cash discount, still pays the old price and so has no benefit.

Such surcharges would be a considerable hardship on consumers given the bad state of our economy. There are those who claim only the rich use credit cards. In fact, credit card use is an economic essential for most people of modest income. Few people have the cash in

hand or in a checking account to make necessary purchases or take advantage of sales, although with both spouses working, they do reach the $10,000 minimum income usually necessary to obtain a credit card.

To force consumers to pay an extra charge to use credit cards may well put consumers in the cruel position of not being able to make a purchase at all since they are not able to pay cash nor able to pay a surcharge credit card price.

Allowing surcharges would also create incredible confusion as to whether prices were being surcharged or discounted.

I introduced H.R. 10209 to protect consumers from these extra charges. This act will bar surcharges on credit cards. It also makes clear that "discount" does not mean a surcharge, and that those offering cash discounts not in excess of 5 percent pursuant to section 167 of the Fair Credit Billing Act, will not be in violation of State usury laws.

H.R. 10209 will help consumers by permitting cash discounts which will reduce prices for cash customers. Credit card users will continue to pay the regular prices for items—unburdened by surcharges.

[The text of H.R. 10209 follows:]

94TH CONGRESS
1ST SESSION

H. R. 10209

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 20, 1975

Mr. ANNUNZIO introduced the following bill; which was referred to the Committee on Banking, Currency and Housing

A BILL

To amend the Fair Credit Billing Act (Public Law 93–495) with respect to the use of cash discounts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Credit Billing Act Amendments of 1975".

SEC. 2. Section 103 of the Truth in Lending Act (15 U.S.C. 1602) is amended by redesignating subsections (p), (q), (r), and (s) as subsections (r), (s), (t), and (u), respectively, and by adding after subsection (o) the following:

"(p) The term 'discount' as used in section 167 of the

Fair Credit Billing Act (15 U.S.C. 1666f), means a reduction made from the regular price. The term 'discount' as used in section 167 of the Fair Credit Billing Act (15 U.S.C. 1666f), shall not mean a surcharge.

"(q) The term 'surcharge' as used in section 103 of the Truth in Lending Act (15 U.S.C. 1602) and section 167 of the Fair Credit Billing Act (15 U.S.C. 1666f) means any means of increasing the regular price to a cardholder which is not imposed upon customers paying by cash, check, or similar means.".

SEC. 3. Section 167 (a) of the Fair Credit Billing Act (15 U.S.C. 1666f) is amended by inserting immediately after the last sentence of subsection (a), the following: "No seller in any sales transaction may impose a surcharge on a cardholder who elects to use such a credit card in lieu of payment by cash, check, or similar means.".

SEC. 4. Section 171 of the Fair Credit Billing Act (15 U.S.C. 1666j) is amended by inserting a new subsection (c) to read as follows:

"(c) Notwithstanding any other provisions of this title, any discount not in excess of 5 per centum offered under section 167 (b) of this title shall not be considered a finance charge or other charge for credit under the laws of any State relating to disclosure of information in connection with credit

transactions, or relating to the types, amounts, or rates of charges, or to any element or elements of charges permissible under such laws in connection with the extension or use of credit.".

Mr. ANNUNZIO. Our first witness this morning is Kathleen F. O'Rielly, legislative director and staff attorney for the Consumer Federation of America.

Ms. O'Reilly, before you proceed, I would like to set some ground rules. We have only 1 day available for these hearings and a large number of witnesses. Therefore, we are going to limit oral presentation to 10 minutes. Of course, every witness will have the opportunity to place his or her entire written statement in the record.

In order to expedite our hearings, we ask the witnesses to summarize their statements wherever possible.

In addition, I would ask witnesses to limit their comments to only those matters that directly affect the legislation before the subcommittee and to save other comments for future hearings.

I would also like to advise that we go into session at 10 o'clock today and that we shall be sitting here. We will leave only to answer the quorum and then come back.

In this day and age of reform, we have reformed ourselves to the point that we are doing business in a state of confusion. And therefore, frustration has set in, not only on some of these people with nothing else to do, but plans that make it inconvenient for others and I want you to know that the Congress is suffering from the same malady.

Ms. O'Reilly?

STATEMENT OF KATHLEEN F. O'REILLY, LEGISLATIVE DIRECTOR, CONSUMER FEDERATION OF AMERICA

Ms. O'REILLY. Thank you, Mr. Chairman.

Consumer Federation of America is a federation of over 200 national State, and local nonprofit organizations that have joined together to espouse the consumer viewpoint. CFA and its member organizations represent over 30 million consumers throughout the United States.

Among our members are: 17 cooperatives and credit union leagues; 45 State and local consumer organizations; 66 rural electric cooperatives; 27 national and regional organizations ranging from the national board of the YWCA to the National Education Association; and 16 national labor unions.

Whether from the perspective of interpreting existent legislation or commenting on proposed legislation, CFA's testimony is directed toward a very narrow issue: Should merchants be allowed to impose

a surcharge on credit card customers? It is CFA's position that they should not. CFA is not, however, opposed to the offer of cash discounts to cash-paying customers.

Proponents of the discount/surcharge option argue strenuously that there is no economic distinction between the two, but that rather they differ only in form. We agree that arithmetically and theoretically the discount/surcharge approaches are substantially the same. Yet the effect on consumers could vary significantly.

Initially it is important to determine what is the "cost of credit." It would appear the proponents of the discount/surcharge option consider that cost to be the percentage a merchant must pay the credit card issuer together with incidental expenses such as increased bookkeeping, postage, employe time, and so forth. They further argue that this cost should be borne by the credit card customer who is currently subsidized by cash-paying customers.

Commonsense and fairness tell us that this "cost of credit" should be offset by the economic advantages which accrue to the merchant from the credit card system. Minimally the cost advantages include increased sales volume and guaranteed payment by the credit card issuer. By offsetting the "cost of credit" with the merchant's economic advantages, we arrive at the "net cost of credit."

It is only this "net cost of credit" which should equitably be passed on to credit card customers. Ideally, any legislation should require that the merchant be allowed only to impose on credit card customers the "net cost of credit" rather than passing on the entire "cost of credit" without absorbing his/her fair share of that cost.

What is likely to happen if the discount/surcharge option were allowed? Like others, we can only speculate. We fear, however, that the surcharge could be manipulated unfairly. Under the often-cited example, let us assume an item is ticketed at $100. The "cost of credit" as described earlier is $4.

Under the discount method, $100 would be the advertised base price, with a $96 cash discount price.

Under the surcharge method, the advertised base price would be $96, with a $100 cost to credit card customers.

Let us assume that the net cost of credit is $2. Given both the discount and surcharge options, what approach would a merchant likely take? Under the discount method the merchant would be more likely to think in terms of net cost and therefore provide a $2 discount since logically there is no reason to allow any more than the minimum discount.

On the other hand, the surcharge method is the perfect opportunity to pass on the entire $4 cost of credit to the credit card customer. That imposes an inequitable burden on credit card customers.

In response, those in favor of the discount/surcharge option insist that the competitive forces in the free market enterprise system will preclude such manipulative effects and will balance potential inequities.

Clearly certain segments of the retail industry are vigorously competitive, but we must look beyond record shops, restaurants and clothing stores. The legislation applies to all segments of retailing, many of which sorely lack the competitive forces which might otherwise act as a safeguard against surcharge abuse.

There is an appalling lack of competition among petroleum companies or among food store chains where the use of credit cards is on the rise. Realizing the large amount of money it takes to fill a tank of gas today, and realizing that fewer and fewer consumers will opt to abandon the safety and convenience of a gas credit card in that situation, what is to prevent the major gasoline companies from imposing an excessive surcharge and thus find still a new way to maximize profits?

Even when speaking of restaurants, consumer options are sometimes more illusory than real. For example, anyone who has traveled several hours on many of our Nation's toll highways has become increasingly disgusted at the lack of competition among the so-called "rest stop restaurants." The outrageously, overpriced, low quality food in every restaurant on the toll highway is a graphic example of unfair monopoly.

Travelers are forced to either go miles out of their way for a decent meal or pack their own meals—a totally unfair and senseless set of alternatives. What a bonanza a surcharge would be to the owners of these "highway robbery" establishments.

We are also concerned about those regulated industries which involve credit cards, most notably airlines and telephones. Can consumers realistically depend on regulatory agencies to suddenly be the champions of the consumer against a padded surcharge—agencies which have so repeatedly issued blatantly anticonsumer positions? Consumers are understandably nervous about placing such trust in the CAB or utility regulators.

Another consumer concern is the psychological effect that the surcharge will entail. Admittedly such an emotional, as opposed to an intellectual, argument should not receive undue weight. Yet as a practical matter, it cannot be ignored. For whatever reason, it would appear that although the discount concept is well received by consumers, they become very upset at the prospect of a surcharge which they view as a penalty.

Undoubtedly, the use of a surcharge would discourage the use of credit cards at a time in our economy when many desperately need that budgetary tool.

We must not assume that only the financially irresponsible use credit cards. They serve as a definite safety advantage particularly to those in urban areas who are afraid to carry more than the bare minimum of cash. They serve as a shortcut to the tedious delays entailed in pulling out reams of identification required to write a check.

Particularly in this city, where those who neither drive nor are employed by the Federal Government are somehow presumed to be dishonest, that advantage is important. Renting an automobile, making reservations for tickets and other transactions are often impossible unless one has a nationally recognized credit card.

There are several related issues which must be addressed by specific and unambiguous statutory, committee report, and Federal Reserve Board regulatory language.

First, uniformity of application on a merchant's entire stock.

If a merchant were permitted to pick and choose, providing a discount/surcharge in some departments and not in others, or in some

stores of a chain and not in others, serious discrimination could result. Specifically, a merchant could analyze marketing data which would reveal, for example, that the most creditworthy customers merchants strive to attract and maintain buy in some departments or geographical locations more often than others.

In those departments or branch stores, the surcharge would not be imposed while in departments or stores frequented by those less creditworthy customers would be forced to pay the surcharge. More likely than not, the low- and moderate-income consumers would be the victims.

A second concern is uniformity of advertising.

Consumers should not have to endure the confusion which would result from a wide variety of methods of advertising the price of an item. Is it the cash paying price, the surcharge price, or something in between? This problem should be anticipated and provided for in specific statutory or regulatory language.

An advance disclosure—the consumer should know both from advertised material and from signs clearly and conspicuously posted on the merchant's window, what exactly to expect in terms of a discount/surcharge. Merchants should not be allowed to benefit from the increased volume generated by the posting of a credit card symbol on the window, only to then discourage use of the credit card by imposition of a surcharge.

For all of the above-stated reasons, CFA is opposed to the imposition of a surcharge on credit card customers.

Mr. ANNUNZIO. I thank you very much for your very effective statement.

[The prepared statement of Ms. O'Reilly follows:]

TESTIMONY OF
KATHLEEN F. O'REILLY, LEGISLATIVE DIRECTOR
CONSUMER FEDERATION OF AMERICA

BEFORE THE
SUBCOMMITTEE ON CONSUMER AFFAIRS
COMMITTEE ON BANKING, CURRENCY AND HOUSING
U.S. HOUSE OF REPRESENTATIVES

October 23, 1975

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in pulling out reams of indentification required to write a check. Particularly in this city where those who neither drive nor are employed by the Federal government are somehow presumed to be dishonest, that advantage is important. Renting an automobile, making reservations for tickets and other transactions are often impossible unless one has a nationally recognized credit card.

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For all of the above-stated reasons, CFA is opposed to the imposition of a surcharge on credit card customers.

-CFA-

Mr. ANNUNZIO. Mr. Barrett, who is chairman of the Housing Subcommittee is also a member of the Domestic Monetary Policy Subcommittee. He will probably have to attend that meeting; and Mr. Barrett, I would like to call on you at the moment, if you want to ask any questions of Ms. O'Reilly.

Mr. BARRETT. I want to comment on Ms. O'Reilly's speed.

[Laughter.]

I think you exceeded the speed limit by at least 60 miles. I think some of these areas need this kind of speed.

Let me tell you what happened in the Philadelphia airport yesterday. No effect on consumers' credit in any sense, but a young, gracious lady came up and bought a Philadelphia Inquirer for 15 cents, and she bought a magazine for 50 cents. There were 15 people waiting in line to pay for what they had picked up at the self-service counter. She handed the cashier a credit card for 65 cents worth when everybody was standing there hoping to get service quickly so they could get on the plane.

I looked at that and I looked at the manpower lost here on this credit card purchase.

I am going to ask you this question. I have been trying to learn what effect the credit cards have on the economy of this country, inflation, and so forth. Could you give us an example of what you think the effect might be on the economy?

Ms. O'REILLY. I think the economy has forced many consumers to use credit cards who otherwise would not. People who are unemployed, who would like very much to make a one-time payment on an item, are forced with a decision of whether to forgo that ability because they are not able to pay for all the purchases at the same time.

I think that there can be many serious disadvantages to credit cards like the temptation to overspend. But I think that those potential hazards have to be addressed by increased consumer education which is being intensified in all areas of the community, school and civic groups trying to acquaint people with ways to budget their problems in a way that they are not going to fall into the trap of credit card abuse.

But in terms of a specific impact on the economy, I do not have any studies or references to that point. In terms of the example in the airport, I think that is an example of discourtesy on the part of that woman.

Mr. BARRETT. In other words, you would have said—"Well, you are gracious and beautiful, just stand aside, and take care of those 15 people."

Ms. O'REILLY. I probably would have paid the 65 cents so I could get on the plane.

Mrs. FENWICK. I know that Mr. Gerwirtz testified persuasively and eloquently—according to the "Consumer Trend" Newsletter—in support of the proposal for authorizing surcharges.

If I have read the Fair Credit Billing Act correctly, it specifically states that a merchant may offer discounts of 5 percent or less on cash purchases "there a credit card is not used."

Now this may be a typical misuse of the word "where" for "when." Are they referring to a shop that does not accept credit cards, where a credit card is not used; or are they referring to a transaction when a credit card is not used?

I think it is probably the latter. And if so, the chairman's comments are carried out by the fact that this 5 percent discount for cash is protected under this law and would not be bothered by the passage of the legislation we are now considering.

But I know that, for example, American Express takes the same view you do. The gentleman testifying for the Consumer Union was also eloquent in support of this measure.

Mr. ANNUNZIO. Would the gentlelady yield? On another panel, we will have a representative from the American Express Card Co.

Mrs. FENWICK. But I would like to know the consumer point of view. Does your testimony, which I read carefully, cover all their opinions?

Ms. O'REILLY. Our view is first that economically there is no difference between the surcharge and the discount if you are looking at the economics of it, that it is just a difference in form. If there really were free enterprise competitive forces in the marketplace and if there really were tight regulatory language that would address some of the concerns I have expressed, and if consumers were truly educated that the difference between the surcharge and the discount is more psychological, given the other two caveats, then I think we would probably be on the same footing with Consumers Union on this position.

But it is the potential for manipulation that I think is so much more consistent with the surcharge than with the discount, and the discriminatory effects if they are able to pick and choose as to which consumers were going to get the surcharge or not.

Mrs. FENWICK. I don't think we can continue in our regulations and legislation to ignore psychology. I think this is part of the problem we are running into in one law after another. We are not willing to pay attention to what the consumer feels. So I have finished my questions.

Thank you, Mr. Chairman.

Ms. O'REILLY. I have spoken to other consumer groups in the past 2 months; and at the end, I have just thrown out issues we were going to take a position on. And when I got to this issue, it was incredible the uniformity of agreement. The minute I talked about surcharges, or credit cards, they are on their feet, their fists are clenched, they get terribly, terribly adamant about the unfairness of it.

Mr. FAUNTROY. I am sorry I wasn't here to hear your statement, but I want to commend you for the care you have taken to protect what is a valid consumer interest.

And, Mr. Chairman, in the interest of time, I would simply like to submit at this point in the record a statement. And in doing so, thank you, Mr. Chairman, for the kind of leadership you have been giving us in demonstrating to the people of the Nation that this country and thus this subcommittee does intend to protect our consumer interest in an exemplary way.

Mr. ANNUNZIO. Without objection, so ordered.

Will the clerk take the statement and put it in the record?

[The statement of the Hon. Walter E. Fauntroy follows:]

STATEMENT OF CONGRESSMAN WALTER E. FAUNTROY IN SUPPORT OF H.R. 10209, A BILL TO AMEND THE FAIR CREDIT REPORTING ACT WITH RESPECT TO THE USE OF CASH DISCOUNTS AND FOR OTHER PURPOSES

Mr. Chairman, I am delighted that you have taken the lead in introducing legislation which would prohibit the imposition of surcharges upon credit card

holders while continuing to permit those who would grant discounts to do so. You have once again demonstrated to the consumers of our nation that this Committee, and more particularly this Subcommittee under your leadership, is ever cognizant of the many pitfalls that transgress each citizen that is committed by government and private institutions.

The issue before us is one in which I have a special interest because the use of credit cards by poor people has long been a source of great contention by the consumer groups and the grantors of credit. Any proposal which permits a greater charge to be imposed for the use of a credit card is reflected immediately in the buying power of our nation's poor.

Poor people, Mr. Chairman, do not use credit cards as a cash substitute or a convenience as you and I might. Poor people use credit cards for cash; the credit card is their entry into quality goods and services for which they are already paying a premium; it is their cash reserve. They must not be permitted to pay an even greater premium.

Additionally, Mr. Chairman, credit cards have opened a whole world of shops and stores to the poor, whose checks are often refused because of the neighborhoods in which they live or the color of their skin, or the quality of their dress. If merchants view the use of credit cards as a cost, some merchants may return to a cash only system, thereby depriving the poor of their services.

While I believe that a merchant should be able to offer a discount for cash if he elects to do so, I firmly believe that centralized credit systems as represented by the BankAmericards, Master Charge, Central Charge, and other revolving credit cards, have made it possible for the merchant to sell big ticket items with less loss from check fraud, credit losses from internal credit systems, and at smaller profit margins because of the increase in volume. Thus, I am reluctant to support any process that would transfer more costs to the consumer, particularly since I believe it can be shown that our centralized credit systems have made credit systems possible for the small merchant—with the resultant increase in purchasing power to all people especially the poor.

I think it is important for us to recognize, Mr. Chairman, that cash also has a price. It is not just credit that has costs. A cash system requires that one accept checks with their attendant losses; that one maintains high cash balances in the drawers with the risks of theft, robbery, and poor management.

Those, of course, who use credit should pay for the use of credit. That is what the interest rate structure is intended to represent. Those who use cash do not pay this interest, and in light of that I want you to know that I fully intend to support this legislation.

I do have some questions that I would like to put forward for the record, which I hope will be answered. I will ask them now in order that everyone can have the opportunity to respond.

1. If a surcharge were to be permitted, would the amounts actually represent a cost of the credit system, or would it merely be another way to achieve a higher mark-up by the merchant?

2. How may merchants have relinquished their use to a centralized credit system and returned to either their own credit systems or to a cash only system?

3. What risks does a merchant assume in the use of a credit cards vs. the use of cash or checks? What are approximately percentages, or dollar amounts that one can give in comparison to one system over another?

4. Would there be any advantage to a poor person in a surchage permissible situation? What are these disadvantages?

Mr. ANNUNZIO. Mr. Fauntroy, I thank you for your statement.

Mr. Wylie?

Mr. WYLIE. Do you think that the current price levels of products generally reflect the use of credit cards?

Ms. O'REILLY. I have not seen all the studies on it and I understand that two studies are in preparation which will actually evaluate the concept of what is the breakdown in terms of the cost of credit and the net cost of credit as I discuss in my testimony, and what percentage of that is being absorbed by the merchant and how far it is being spread across and to what extent it has reached the prices of commodities.

I think it is logical to assume that the prices of certain commodities have gone up a certain degree.

On the other hand, I think it is just as elementary that the increased sales volume that is generated because of the use of a credit card, that sales volume is another factor which goes to decrease the price of a commodity which is passed across the board, too.

So I don't think that in every situation it is accurate to say that cash-paying customers derive no benefit from the credit card system. I acknowledge that that benefit may be minimal in some merchant areas and not in others. But if a large chain is able to increase their volume by 30 percent because they advertise two or three nationally recognized credit cards, that must be a factor for them to reduce the commodities across the board.

Mr. WYLIE. In other words, what you are saying is that people tend to buy more with the use of the credit card?

Ms. O'REILLY. That's right.

Mr. WYLIE. I was a little bit taken aback when I received the letter from the Federal Reserve Board. They were attempting to draft regulations in connection with the Fair Credit Billing Act and the question arose as to whether the word "discount" includes the word "surcharge." And this was almost beyond my comprehension. I don't think they are synonymous in any way. That is one of the reasons for the bill.

And on page 2, I see we say that the term as used in the section shall not be surcharged, and there was never any apprehension that it did, in your mind?

Ms. O'REILLY. No.

Mr. WYLIE. Are you aware that in some States the usury laws provide that the offering of discount is a violation of the usury law?

Ms. O'REILLY. I am not aware if that is true or not. Because we didn't have a policy resolution on this issue, it was necessary to bring this up to our board of directors last week and the issue was specifically on the surcharge discount and we did not address ourselves to the issues, part of it. So I would not be authorized to comment on that aspect of it.

Mr. WYLIE. We may have to put something in the bill to take care of that.

Thank you very much.

Mr. ANNUNZIO. Thank you, Mr. Wylie.

Our next witness is here. But before we hear from Mr. Sheehan, Mr. Grassley, do you have any questions of Ms. O'Reilly?

Mr. GRASSLEY. Are you in support of the bill as it is before us now?

Ms. O'REILLY. The draft I have seen seems in consonance with our position.

Mr. GRASSLEY. Is it the philosophy of your organization that a cash customer ought not to subsidize a customer who buys on time and the customer who buys on time ought not to subsidize the cash customer?

In other words, cash sales ought to carry their own share of the burden and people who buy on time and thus incur all the costs that are connected with that; the additional administrative costs, the interest, anything associated with the credit card end of it, ought to pay their fair share; or do you believe they ought to be kind of interspersed?

Ms. O'REILLY. We believe in a pro rata allocation of those costs, but we want to emphasize that to speak about the increased cost of credit to the credit card customer, meaning the percentage that the merchant must pay the issuer together with postage, and so forth, must be offset by the economic advantages to the merchant because of the credit card system and the guaranteed payment, they don't have to worry about collection processes, and so forth. That is a cost saving. So the merchant should also pay part of the cost. It shouldn't all go to the credit card customer.

Mr. GRASSLEY. Is it your opinion that it is possible to segregate these costs?

Ms. O'REILLY. I understand there are two studies forthcoming which will be able to segregate them.

Mr. GRASSLEY. But your organization at least starts with the philosophy that the cash customer ought to reap the benefits of paying cash and not subsidize the merchant who charges; and the customer who charges ought not to be subsidizing the cash customer in any way and that, in fact, the cost connected with charging ought to be paid solely by the manufacturer who charges?

Ms. O'REILLY. By the person who benefits. The merchant and the credit card customer and to a certain extent the cash-paying customer as well. But that is an exception, not the rule.

Mr. GRASSLEY. So your organization isn't out just to protect the people who charge and want to buy on credit because they don't want to accumulate the cash, to pay cash?

Ms. O'REILLY. We are looking at the consumer in both roles.

Mrs. FENWICK. A lot of people don't like to carry cash.

Ms. O'REILLY. It is not safe in this city.

Mr. ANNUNZIO. We thank you, Ms. O'Reilly.

We have Mr. Sheehan here this morning, a legislative representative of the United Steelworkers of America.

Mr. Sheehan, we will ask that you summarize your statement in about 10 minutes, and then you can proceed. And your entire statement, without objection will be made part of the record.

STATEMENT OF JOHN SHEEHAN, LEGISLATIVE DIRECTOR, UNITED STEELWORKERS OF AMERICA, ACCOMPANIED BY KEN KOVAK

Mr. SHEEHAN. Thank you, Mr. Chairman. My name is John Sheehan. I am from the United Steelworkers of America, and I am accompanied by Ken Kovak from the Steelworkers Union.

This statement which we submitted, unfortunately, we changed some of the language in it, but not the substance of it. And so I will read through it rather rapidly, because it is a short statement.

First of all, we would like to commend the committee and its chairman for moving with speed on this issue. Unfortunately, issues like this come up very quickly, and the committee has to act very fast.

I am grateful today to have the opportunity to speak on behalf of the hardworking American, most of whom can only get the things he needs for his family by paying on time.

For him, having a credit card can mean buying a household necessity on sale instead of waiting until the cash is available—or taking

a Bicentennial trip normally impossible within the confines of his monthly checking balance.

To the great middle cass, a credit card is not a license to indulge in luxuries, it is a necessity. And when the result of having one is to gain the power to buy more goods, I am sure you will realize that surcharges pose a serious inflationary threat to that power and may minimize the power to buy goods.

We are dismayed when we began looking into this issue that the addition of a 5-percent surcharge could run an interest rate up as high as 60 percent over 12 months, if the entire bill wasn't paid within 30 days of each credit card billing.

As you have stated, Mr. Chairman, there are approximately 500 million credit cards in circulation and the surcharge could add billions in cost to an already overburdened consumer population.

Placing this kind of burden on the household budget which has been trimmed down to the last dollar by rising prices, is unfair and completely contrary to the interests of the steelworkers and millions of other Americans who find themselves in tight straits.

At this time 12 percent of the Steelworkers membership is out of work and many more are being asked to work a short week. We have never asked that credit cards be given to those whose salaries do not qualify, but we are asking that those that do qualify should not have to pay an even greater price for using the cards.

The United Steelworkers Union realizes that the points we are making here place us squarely on the side of the credit card companies. This may be true, but we are here today solely because we want to protect that middle class family which is struggling. Times are very hard and we expect they will get worse, so we can see no reason why a surcharge can be justified.

There are two very important points I would like to make about merchants and the surcharge issue. Many are small businessmen, also finding it hard to meet ends. We in the Steelworkers share their concern and therefore decided to look into the cost-effectiveness of accepting credit cards.

Our findings were very satisfying because we discovered that merchants who accept credit card payment receive an attractive array of advantages.

By affiliating with one of the major companies, a small business can enjoy the benefit of thousands of dollars' worth of advertising, which undoubtedly attracts the shopper who may not have the funds for an item in his checking account. My recent queries into the financial status of commercial banks in this country indicate there are more people than ever maintaining the lowest amount of working capital they can get by on in their checking accounts.

For the businessman who deals in more expensive items, it is obvious a "cash only" policy would hurt significantly and that credit cards offer an easy alternative—an instantaneous and safe credit plan.

When I compare the cost of acquiring data processing equipment and/or check verifying services, I can't help but believe that the 3–6 percent charged the merchant for putting the decal on his door is a significant long-range savings.

To reinforce this statement, I would just cite a 1975 national Bank-Americard, Inc., study which showed that approximately 40 percent

of the three-party credit card charges at the stores sampled would not have been made had credit cards not been accepted there.

This is sound evidence that accepting credit cards is more in the interest of good competition than a noble attempt on the part of the merchant to make life more convenient for the shopper.

If there is empirical evidence to show that accepting credit cards does not produce a marked increase in sales volume, we would very much like to hear it. For now, we believe that guaranteed payment and increased business is more than worth the merchant's costs for affiliation, and that a surcharge to the consumer would be an unfair shift of the responsibility for these benefits.

In summary, I would just like to say that using credit cards to buy time, as well as goods, has become an American way of life—we believe just as the credit card companies have wanted.

So it would be foolish then to assume that the majority of credit cards belong to the affluent who could afford to pay a surcharge. Because many consumers will continue to use credit cards, regardless of the cost, it will place an unjustifiable burden upon many middle income groups.

If there is some question about the tendency of card users to overextend their credit, then you may well be questioning the use of credit itself and the credit economy. However, and I don't think that the committee is going to be taking that issue on front, however, the method of denying the few, who may overextend, access to credit should not be through a procedure which places a financial burden or charge upon the many who will continue to use the credit card.

Furthermore, if merchants would prefer cash transactions, there is no reason why they cannot offer cash bonus as an incentive to the cash purchase rather than have the merchant reap the advantages of additional charges. I relaize it might also result in a decreased use of the credit card, but those who use them will have to pay the higher price.

Our experience indicates that men and women hard hit by unending "stagflation," have brought home the value of time payments. And there is no doubt in my mind that surcharges would unjustifiably burden the use of this valuable solution for some of the problems tight money has brought to many people.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Sheehan follows:]

PREPARED STATEMENT OF JOHN SHEEHAN, ON BEHALF OF THE UNITED STEELWORKERS OF AMERICA, REGARDING A PROPOSAL TO AMEND THE FAIR CREDIT BILLING ACT, H.R. 10209

Mr. Chairman, first I would like to commend you for your recognition of the seriousness of this issue and for having introduced legislation and brought surcharging to the hearing stage with such speed. May I say it is indicative of the leadership you have shown as chairman of the Consumer Affairs Subcommittee.

I am grateful today to have the opportunity to speak on behalf of the hard-working American most of whom can only get the things he needs for his family by paying on time.

For him, having a credit card can mean buying a household necessity on sale instead of waiting until the cash is available—or taking a Bicentennial trip normally impossible within the confines of his monthly checking balance.

To the great middle class, a credit card is not a license to indulge in luxuries, it is a necessity. And when the result of having one is to gain the power to buy more goods, I am sure you will realize that surcharges pose a serious inflationary threat to that power.

We were dismayed when we began looking into this issue that the addition of a 5% surcharge could run an interest rate up as high as 60% over 12 months if the entire bill wasn't paid within thirty days of each credit card billing.

As you have stated, Mr. Chairman, there are 500 million credit cards in circulation and the surcharge could add billions in cost to an already overburdened consumer population.

Placing this kind of burden on the household budget which has been trimmed down to the last dollar by rising prices, is unfair and completely contrary to the interests of the Steelworkers and millions of other Americans who find themselves in tight straights.

At this time, 12% of the Steelworkers membership is out of work and many more are being asked to work a short week. We have never asked that credit cards be given to those whose salaries do not qualify, but we are asking that those that do qualify should have to pay an even greater price for using the cards.

The United Steelworkers Union realizes that the points we are making here place us squarely on the side of the credit card companies. This may be true, but we are here today solely because we want to protect that middle class family which is struggling. Times are very hard and we expect they will get worse, so we can see no reason why a surcharge can be justified.

There are two very important points I would like to make about merchants and the surcharge issue. Many are small businessmen, also finding it hard to make ends meet. We in the steelworkers share their concern and therefore decided to look into the cost-effectiveness of accepting credit cards.

Our findings were very satisfying because we discovered that merchants who accept credit card payment receive an attractive array of advantages.

By affiliating with one of the major companies, a small business can enjoy the benefit of thousands of dollars worth of advertising, which undoubtedly attracts the shopper who may not have the funds for an item in his checking account. (My recent queries into the financial status of commercial banks in this country indicate there are more people than ever maintaining the lowest amount of working capital, they can get by on in their checking accounts).

For the businessman who deals in more expensive items, it is obvious a "cash only" policy would hurt significantly and that credit cards offer an easy alternative—an instantaneous and safe credit plan.

When I compare the cost of acquiring data processing equipment and/or check verifying services, I can't help but believe that the 3–6% charged the merchant for putting the decal on his door is a significant long-range savings.

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This is sound evidence that accepting credit cards is more in the interest of good competition than a noble attempt on the part of the merchant to make life more convenient for the shopper.

If there is empirical evidence to show that accepting credit cards does not produce a marked increase in sales volume we would very much like to hear it. For now, we believe that guaranteed payment and increased business is more than worth the merchant's costs for affiliation, and that a surcharge to the consumer would be an unfair shift of the responsibility for these benefits.

In summary I would just like to say that using credit cards to buy time as well as goods has become an American way of life—we believe just as the credit card companies have wanted.

So it would be foolish then to assume that the majority of credit cards belong to the affluent who could afford to pay a surcharge.

My daily experience dealing with the man and woman hit hardest by unending stagflation has brought home to me the value of time payments and there is no doubt in my mind that surcharging would virtually eliminate this as valuable solution for some of the problems tight money has brought to many many people.

I ask you in their behalf not to allow this to happen. Thank you.

Mr. ANNUNZIO. I thank you, Mr. Sheehan. The bells have rung for a quorum. We are going to answer the quorum and come back.

I want all of the witnesses here today to remain. I have talked with Mr. Wylie, the ranking minority member. Under the rules of the

House, if we are on the 5-minute rule, we are not able to go into executive session and mark up the bill. But if we are fortunate enough to hear all of the witnesses, and we go into general debate some time today, I am hoping to go into executive session to mark up the bill. But we must be in general debate. This subcommittee will not violate any of the rules of the House.

Mr. WYLIE. That is fine. Technically, a subcommittee or full committee cannot meet during the 5-minute rule of the official session. So it would have to be informal. I think that as far as the markup or reporting of the bill, we ought to follow the rules of the House.

Mr. ANNUNZIO. We will follow the rules. We will not mark up the bill if we are under the 5-minute rule. I am hoping there will be a long general debate for getting the bill marked up, and we want to get a full committee here next week to present this bill to the full committee. We don't come back until Tuesday. We are fighting a deadline on the Rules Committee. This bill is being attached to another bill in the Senate, as I understand it. They can get away with it there. And so we have this deadline to fight, and we are going to try to cooperate.

Mr. WYLIE. I think the people ought to understand. there is a very important bill on the House floor called the Emergency Rail Transportation Act, and that is the reason for the rule.

Mr. ANNUNZIO. Well, before you came in, I made the statement about the confusion.

[Recess.]

Mr. ANNUNZIO. The meeting of the subcommittee will come to order. Mr. Sheehan, I am deeply grateful for your fine statement. I have two questions: to your knowledge, do you know of any unions or organizations that would oppose surcharges?

Mr. SHEEHAN. Of course, we are here today as one organization, the Steelworkers, who are opposed to it; and within the labor group, the International Garment Workers Union and the Amalgamated Meatcutters Union have already expressed a position in opposition to it, together with a federation within the AFL–CIO, known as the Industrial Union, they expressed their opposition to the surcharge. This is within the labor movement, of course.

Mr. ANNUNZIO. Can you tell me: what other ways do you think this legislation will benefit credit-card holders?

Mr. SHEEHAN. Actually, Mr. Congressman, I realize we are sort of going over ancient history, and I know you were one of those interested in passing the truth-in-lending bill. And you felt that by means of that, the consumer was going to get the best he could in the marketplace. And yet I feel, to an extent here, we are going to erode that principle by allowing these charges to come in and somehow or another, even though the merchant is the one that is charging it, we felt that it was really a credit charge. And now it is going to escape disclosure on the truth-in-lending bill.

So the benefit, one benefit, is preventing the loss of something we thought we had accomplished when the truth-in-lending bill was passed in the first place.

But, of course, as to whether the credit card itself is an advantage, I certainly know that it is. Many people from a convenience point,

carry it. Also you don't go walking around with a big wad of dough in you pocket in any city. Washington, D.C., is no worse than anywhere else.

Mr. ANNUNZIO. I really believe that we are going to have some genuine turmoil with gasoline. If the gasoline cost, people who have credit cards go in and buy 10 gallons of gas for 63 cents a gallon, $6.30; and at the end of the month if they ever get this 5 percent, which we are going to accuse the big gasoline companies of coming through the back door to get another increase on gasoline.

It is just going to be hard to pay in this country. Do you have any questions?

Mrs. FENWICK. I haven't got any credit cards myself, but I just hope we could get a return for paying in cash. Maybe we could have a price reduction.

Mr. SHEEHAN. I agree.

Mr. ANNUNZIO. I want to make it clear, Ms. O'Reilly has hit on it. We are not hitting the cash portion of the truth-in-lending bill. That stays as it is. I was on the conference committee. I don't know who dreamed up this surcharge thing, because nowhere was there any legislative history made on this point. It is just that somebody in the Federal Reserve Board in writing the regulation added surcharges, and then I wrote a letter to the Chairman of the Federal Reserve, and he withdrew the legislation, and now somebody in the Senate is trying to put it back in. We are fighting a real deadline here, and I am waiting for Mr. Wylie to come back. We are fighting this October 28 deadline.

Mrs. FENWICK. If we can get into general debate this afternoon, we can have a markup session here.

Mr. ANNUNZIO. At this point I want to ask, Ms. O'Reilly, can you announce for me the vote of your executive board on this legislation?

Ms. O'REILLY. It was a voice vote. It was an overwhelming majority in support of the legislation.

Mr. ANNUNZIO. I thank you very much for your excellent presentation.

Jack Sheehan, as you know, I used to work for the Steelworkers Union and I appreciate your being here this morning and letting us know about the International Garment Union and the Meatcutters; and I thank you both for your cooperation.

Mrs. FENWICK. I haven't worked for the Steelworkers Union, but I have benefited by their advice.

Mr. SHEEHAN. Thank you.

Mr. ANNUNZIO. The next panel, Paul Gewirtz and David R. Roll.

I am going to announce another change in our plan. We have been questioning each panel. In view of the fact that we have finished with the first panel, there are three panels. I am going to allow the witnesses to read their statements in 10 minutes and then we'll ask questions at the end of all five people.

Forgive us. That is another quorum call. We'll be right back.

[Recess.]

Mr. ANNUNZIO. Meeting of the subcommittee will come to order. I want to make another announcement as to the reasons I am urging the members of the subcommittee to cooperate today and we'll follow the House rules.

As you all know, on October 28 the Fair Credit Billing Act goes into effect. Unless we provide an exemption from usury laws for cash discounts, we'll be denying those benefits to millions of Americans.

For this reason I am making every attempt today under the rules of the House to go into executive session and try to at least check this particular problem. So I am going to welcome now, Paul Gewirtz from the Center for Law and Social Policy, representing the Consumers Union, and David R. Roll, representing the Atlantic Richfield Co.

Mr. Gewirtz, would you proceed in your own manner and I ask unanimous consent that your entire statement be made part of the record.

STATEMENT OF PAUL GEWIRTZ, ATTORNEY AT THE CENTER FOR LAW AND SOCIAL POLICY, ON BEHALF OF THE CONSUMERS UNION OF THE UNITED STATES

Mr. GEWIRTZ. My oral statement will generally follow my rather long written testimony, but I will try to condense it as much as possible.

Good morning. My name is Paul Gewirtz. I am an attorney at the Center for Law and Social Policy, and am testifying on behalf of the Consumers Union of the United States. My oral presentation will generally follow, but condense, the written testimony that I hope you have before you.

Consumers Union appreciates the opportunity to appear here today.

Section 167 has been a source of great consumer interest and enthusiasm, and a favorable resolution of the issues being considered today is important if the promise of the act is to be fulfilled.

Consurems Union has been actively involved with the cash discount issue, and I think that it would be useful to begin by briefly describing these efforts.

Since credit cards were first introduced, the major credit card issuers have prohibited merchants from charging lower prices to cash customers than credit card customers, and the effect of these contractual restrictions is to force cash customers to subsidize the special benefits that credit card customers receive.

In February 1974, Consumers Union filed antitrust litigation to remove the restrictions on two-tier pricing that were imposed by credit card issuers. Favorable settlements with American Express Co. and other credit card issuers produced a great amount of consumer excitement.

Subsequently, the Congress passed and the President signed the Fair Credit Billing Act.

This is important legislation, widely hailed by consumers for removing competitive restraints and encouraging the fair treatment of cash-paying customers. As soon as the act goes into effect at the end of this month, Consumers Union anticipates launching a major campaign to educate consumers about the true costs associated with credit card use and to persuade merchants to institute a system of two-tier pricing.

Two problems have recently emerged which we believe seriously threaten these efforts. On September 15, the Federal Reserve Board

issued regulations implementing section 167 which sharply restrict two-tier pricing and seriously undercut the statute. In addition, a usury issue now has surfaced which only clouds the waters further. Chairman Annunzio's proposed legislation, we believe, would effectively eliminate this second problem, usury restrictions that would prevent beneficial two-tier pricing.

But Mr. Annunzio's proposed legislation follows the Federal Reserve Board in restricting one form of two-tier pricing, so-called surcharges. We strongly oppose this restriction, which will hurt cash-paying customers.

Exactly the opposite medicine is required. Legislation should be passed that would overrule the Federal Reserve Board's restriction on surcharges, and finally give two-tier pricing the chance that it deserves.

SURCHARGES

An illustration will be useful, I think, in understanding the "surcharge" question, and the illustration used by Chairman Arthur Burns in his September 16 letter to Congress is as good an example as any. A merchant interested in charging cash customers a lower price than credit card customers could grant the discounted price in two ways: First, the merchant could choose to ticket a product for $100, but then deduct $4 if a customer pays cash.

Alternatively, the merchant could choose to ticket the product for $96, but then surcharge $4 if the customer pays with a credit card. The Federal Reserve Board has decided to theat these two forms of two-tier pricing completely differently.

By a 4 to 3 vote, the Board has decided that a merchant who wants to use the surcharge method is essentially restricted from doing so. This was the position urged upon the Board by the credit card industry.

These regulations, in our view, misconstrue Congress intent in passing section 167 and will block much beneficial two-tier pricing.

In adopting the credit card industry's postion, the Board disregarded the arguments made by a broad cross-section of parties submitting comments to the Board, including Chairman Proxmire of this committee, the Antitrust Division of the Justice Department, the Federal Trade Commission, Atlantic Richfield Co., and Consumers Union.

As these comments all indicated, it is unreasonable to treat the two forms of two-tier pricing differently. There are at least five reasons that we believe that Congres should act now to assure that merchants are free to use the "surcharge" method of two-tier pricing.

First, whether a merchant "surcharges" when a customer uses a credit card, or "deducts" when a customer pays by cash, the economic effect on the individual consumer is the same, and the benefits to cash customers are the same. In each system described by Chairman Burns, there are two prices, a cash price—$96—and a credit card price—$100. In each system, the cash customer receives a discounted price. The difference is simply one of form. This is the conclusion of numerous independent economists.

Second, to restrict "surcharges" will significantly restrict the use of beneficial two-tier pricing. Depending upon his marketing strategy, a merchant may prefer one form of two-tier pricing to another.

Many merchants will prefer the surcharge method, and in fact will be willing to use two-tier pricing only if they can use the surcharge method. Now why is this? Mainly because these stores gear their promotional efforts to the rockbottom cash price that they charge. These stores would prefer to say "cash price $96, 4-percent surcharge for credit card" rather than "$100 is our price, 4-percent deduction for cash." Or consider the store which until now has not accepted any credit cards at all. Now suppose that this store agrees to accept credit cards. Rather than raise its prices to all customers to cover the extra credit card costs, this store might well prefer to use the surcharge system of two-tier pricing.

As the credit card issuers recognize, if the surcharge form of two-tier pricing is permitted, two-tier pricing stands a more likely chance of catching on. In short, a regulation disfavoring surcharges would deprive many consumers of beneficial two-tier pricing altogether.

Chairman Annunzio has suggested that, while the discount method is beneficial, the surcharge method would be used by merchants simply to penalize credit card customers without any benefit to cash customers. This, I respectfully submit, rests on a basic misunderstanding.

Under the present system of single prices, a merchant's substantial credit card costs are generally reflected in higher prices charged to all customers, both cash and credit card; cash customers generally subsidize the costly credit card services.

The point of two-tier pricing systems of any sort—deduction or surcharge—is to permit a reallocation of these credit card costs, so that people who use credit cards pay their own way, and cash customers save by no longer subsidizing others.

Average prices would not be any greater than they would have been without two-tier pricing. There will simply be a reallocation of these prices.

The precise effect on prices of a two-tier pricing system will depend on factors peculiar to a specific store, but the effect on prices will be the same under either form of two-tier pricing, and cash customers benefit under either. Merchants should be free to choose either.

As economic studies have indicated, the usual effect of either two-tier pricing system is likely to be that credit card customers will pay a little more and cash customers a little less than they would otherwise pay.

In some cases, prices to credit card customers will stay the same and prices to cash customers will fall.

In some cases, where other inflationary factors are working their toll, prices to credit card customers will rise and cash prices will stay the same. But in this latter situation, a merchant would have raised his prices anyway, and without two-tier pricing he would have imposed a general price rise on all customers, both cash and credit card; instead, by allocating his credit card costs, the merchant benefits cash customers in this situation as well.

Merchants who wish to benefit cash customers in these various ways that I have described should be free to do so, and should be free to do so using either the surcharge or deduction method of his or her pricing.

The suggestion that the surcharge system, unlike a cash deduction system, will be used to extract unreasonably higher prices from credit card customers is simply wrong, for two basic reasons.

First, the retail market is one of the more competitive markets we have, and merchants will simply not be able to use surcharges to raise prices above the level necessary to effect the reallocation discussed above. Second, if a merchant did possess market power enabling it to use surcarges to raise prices above the competitive level, he would not need a surcharge to do so; he could inflate all his prices an equivalent amount under a "cash deduction" system, or, for that matter, he would have the market power to raise all his prices without instituting a two-tier pricing system at all.

I have furnished the subcommittee with an independent study proposed by economists from Princeton University and the University of Rochester which reaches exactly these conclusions.

In short, credit card surcharges are no more open to abuse than cash deductions, and are just as beneficial to cash customers.

A third reason that the Federal Reserve Board's restrictions on surcharging should be reversed is that it was clearly Congress purpose in passing section 167 to encourage both forms of two-tier pricing. In section 167 of the act, Congress sought to make it easier for merchants to charge cash customers less than credit card customers. There is not a shred of evidence in the statute or its legislative history that Congress wished to interfere with a merchant's decision concerning how to structure this two-tier pricing.

Furthermore, in passing section 167, Congress was particularly concerned that restrictions imposed on merchants by credit card issuers limited a merchant's freedom to price his goods as he wished, in violation of the antitrust laws. It is not likely that Congress meant to permit restrictions on surcharges to continue in violation of the antitrust laws.

It is of significance, I think, that Senator William Proxmire, a primary sponsor of the Fair Credit Billing Act, has explicitly stated that section 167 was designed to encourage both forms of two-tier pricing, and that the Federal Reserve Board's regulations frustrate the goal of the statute.

Furthermore, whatever they may say to this subcommittee today, the banking and credit card industry's testimony to Congress before section 167 was passed explicitly states that the industry recognized that both forms of two-tier pricing were to be permitted by section 167.

Beyond what has already been said, the surcharge form of pricing has two other advantages for the consumer. First, as the Federal Trade Commission points out in its comments to the Board of June 30, 1975, the surcharge method, by its very nature, is likely to make the credit card customer particularly aware that he is paying an extra charge for credit. Thus, the underlying disclosure purposes of the Truth-In-Lending Act and of section 167 are especially well served by this method.

Some credit card issuers are particularly opposed to the surcharge method precisely because the surcharge would alert their customers to the extra charge for credit and induce a switch to cash payment. This industry reasoning only confirms that t hepurposes of the Truth-in-

Lending Act and section 167 are particularly well-served by the surcharge method.

Second, for reasons discussed in detail in our written testimony, the surcharge method may lead to increased competition among credit card issuers, which is surely in in the public interest.

In sum, for the reasons set forth above, and set forth in the comments submitted to the Federal Reserve Board by Senator Proxmire, the Department of Justice, the Federal Trade Commission, Atlantic Richfield Co., and others, we believe that the subcommittee should not adopt Chairman Annunzio's proposed amendment, but rather should propose legislation which permits both forms of two-tier pricing.

Proposed Language Dealing With Surcharges

The objective described above could be achieved by either of two relatively simple amendments to section 167, and we present each for the subcommittee's consideration:

Alternative 1.—Amend section 167 by adding the following new subsection (c), which simply clarifies the meaning of the word "discount" in section 167(a) and (b):

(c) For purposes of this section, a discount to induce payment by cash, check, or similar means includes a charge added to the price generally available to purchasers of goods and services paying by cash, check, or similar means, which is imposed as a condition or consequence of the use of a credit card with respect to a transaction involving such goods or services.

Alternative 2.—In its revised proposed regulations of July 30, 1975, which did not distinguish between surcharges and deductions, the Federal Reserve Board used the phrase "price differential" instead of the word "discount." As long as the subcommittee report explains the significance of the change, the present confusion could be remedied simply by amending section 167 (a) and (b) to replace the word "discount" with the phrase "price differential."

The usury situation is at best uncertain and there may in face be usury problems in some States—more clearly for issuers, but for merchants as well in some States.

Therefore, to remove the existing uncertainties, we support Chairman Annunzio's carefully limited Federal legislation that would insulate issuers and merchants from State usury problems in the narrow pricing situations covered by section 167 of the Fair Credit Billing Act.

If Congress does not preempt any State usury obstacles in these limited, special circumstances, there will be so much uncertainty and confusion about potential usury liabilities of merchants that the cash discount movement will be badly hurt.

Uncertainties about their usury liabilities will frighten and discourage some merchants who are considering two-tier pricing. Credit card issuers have already suggested that merchants not give cash discounts if they wish to avoid breaching State usury laws—not a surprising strategy for an industry that has tried to stop cash discounts by one tack or another for years.

Moreover, as I have already stated, Consumers Union itself expects shortly to launch a major cash discount campaign. As part of the cam-

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paign, consumers intend to visit stores in many communities to try to persuade merchants to grant cash discounts.

We obviously do not want to encourage merchants to take any step which would subject them to a substantial risk of violating the law. To require the usury issue to be resolved on a State-by-State basis would be full of uncertainties and would be terribly burdensome and confusing. A uniform Federal approach should be adopted to clear the air and give cash discounts a chance.

Congress has already eliminated several significant obstacles to cash discounts, and removing this one additional obstacle merely implements existing legislative policies.

Thus, in section 167 Congress eliminated contractual restraints to cash discounts, and also eliminated Truth-in-Lending Act obstacles to cash discounts by exempting most cash discounts from detailed Truth-in-Lending disclosures.

Indeed, in section 167(b) Congress has explicitly determined that a discount should not be viewed as a cost of credit for Truth-in-Lending Act purposes.

Similarly, it should not be viewed as a cost of credit for State usury purposes. Congress' failure to preempt State usury laws in the section 167 situation is an oversight that should be corrected, consistent with established congressional policy to remove obstacles to cash discounts.

Third, and finally, a very narrow and limited preemption of State usury laws is all that is required. Therefore, we are confident that a special exemption here would not erode basic usury principles, any more than section 167's existing exemption from the Truth-in-Lending Act is an erosion of basic truth-in-lending principles. Chairman Annunzio's proposal mandates an extremely narrow preemption tied explicitly to section 167 price differentials. Thus, it is carefully limited to narrow circumstances that have already received congressional blessing in section 167, where the price differential is 5 percent or less and the differential is clearly and conspicuously disclosed to all customers.

We are concerned, however, about one matter connected with this usury question, which we believe Congress should address in any legislation preempting State usury laws.

In their recent testimony before the Senate Banking Committee, the card issuers described their concern about possible State usury problems if merchants who accept their cards decide to offer cash discounts, and the issuers stated that they were considering various steps to protect themselves pending possible Federal legislation preempting these State usury laws.

One such step is to inform merchants that both merchants and issuers face potential usury problems if the merchant offers cash discounts, and furthermore to require the merchant to hold the issuer harmless for any of the issuer's potential liabilities. The effect of such a notice from issuers to merchants is likely to be devastating; merchants will be so frightened of financial liabiilties that they will simply offer no cash discounts at all, and the issuers will have achieved indirectly what their flat prohibition on discounts has hitherto achieved directly.

But if the issuers' potential usury problems are eliminated by Federal legislation, there is absolutely no justification for issuers imposing

hold harmless clauses on merchants or for their employing any other devices that will make merchants fear usury liabilities.

Therefore, Consumers Union believes that if legislators passed preempting State usury laws in the cash discount situation, something should be required to inform merchants that there are, in fact, no usury problems.

We think that this should be an explicit part of any Federal legislation preempting State usury laws, and we have proposed language to this effect.

If protection against State usury laws is granted, as the issuers request, the issuers should not be allowed to continue to let merchants think that there are potential usury problems and hold harmless liabilities.

PROPOSED LANGUAGE DEALING WITH USURY

Consumers Union proposes that the following sentence be added to Chairman Annunzio's proposed amendment to section 171 of the Fair Credit Billing Act, as a continuation of section 171(c):

"Within 30 days of the effective date of this subsection, any card issuer which has previously notified any person about usury liability in connection with the offering of discounts for payment by cash, check or similar means, whether by contract containing a hold harmless clause or otherwise, shall inform such person that there are no usury liabilities in connection with the offering of any discount under section 167(b)."

[The prepared statement of Mr. Gewirtz follows:]

Testimony of 1/
Consumers Union of United States, Inc.
Submitted by Paul Gewirtz, Esq.
Center for Law and Social Policy
Before The
Subcommittee on Consumer Affairs
of the
House Committee on Banking
October 23, 1975

Consumers Union appreciates the opportunity to appear before the Consumer Affairs Subcommittee to present its views on two important issues arising out of Section 167 of the Fair Credit Billing Act, concerning cash discounts. Section 167 has been a source of great consumer interest and enthusiasm, and a favorable resolution of the issues being considered today is important if the promise of the Act is to be fulfilled.

Consumers Union has been actively involved with the cash discount issue, and I think that it would be useful to begin by briefly describing the background and nature of these efforts. Credit card companies impose a substantial service charge on

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1/ Consumers Union of United States, Inc. ("Consumers Union") is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education, and counsel about consumer goods and services and the management of the family income. Consumer Union's income is derived solely from the sale of Consumer Reports (magazine and TV) and other publications. Expenses of occasional public service efforts may be met, in part, by nonrestrictive, noncommercial grants and fees. In addition to reports on Consumer Union's own product testing, Consumer Reports, with a circulation of almost 2 million, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

merchants whenever a credit card sale is made. Given the extra costs that many merchants incur for credit card sales, Consumers Union believes that merchants should be free to charge cash customers lower prices than credit card customers -- in effect to grant customers a discount for cash payment -- and that legal and contractual impediments to such price differentials hurt cash-paying customers and are contrary to the public interest. Historically, however, the major credit card issuers have prohibited merchants from instituting any system of price discounts for cash payment. In February, 1974, Consumers Union filed antitrust litigation to remove the contractual restrictions on two-tier pricing that were imposed by credit card issuers. Favorable settlements with American Express Company and other credit card issuers produced a great amount of consumer excitement. Subsequently, the Congress passed and the President signed the Fair Credit Billing Act, which: (1) explicitly prohibits restraints on a merchant's freedom to charge a discounted price to customers paying with cash as opposed to credit card (§ 167(a), and (2) exempts most such two-tier pricing from the detailed disclosure requirements of the Truth-in-Lending Act (§ 167(b)). This is important legislation, widely hailed by consumers for removing competive restraints and encouraging the fair treatment of cash-paying customers. As soon as the Act goes into effect at the end of

this month, Consumers Union anticipates launching a major campaign to educate consumers about the true costs associated with credit card use and to persuade merchants to institute a system of two-tier pricing.

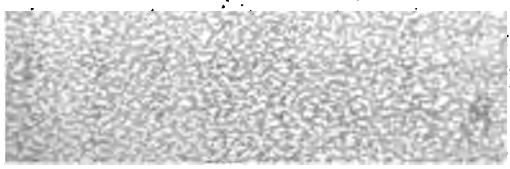
Two problems have recently emerged which seriously threaten these efforts. On September 15, the Federal Reserve Board issued regulations implementing § 167 which sharply restrict two-tier pricing and seriously undercut the statute. In addition, a usury issue now has surfaced which only clouds the waters further. Chairman Annunzio's proposed legislation, we believe, would effectively eliminate this second problem, usury restrictions that would prevent two-tier pricing. But Mr. Annunzio's proposed legislation follows the Federal Reserve Board in restricting one form of two-tier pricing, so-called surcharges. We strongly oppose this restriction, which will hurt cash-paying customers. Exactly the opposite medicine is required. Legislation should be passed that would overrule the Federal Reserve Board's restrictions on surcharges, and finally give two-tier pricing the chance that it deserves.

1. "Surcharges"

An illustration will be useful, I think, in understanding the "surcharge" question, and the illustration used by Chairman Arthur Burns in his September 16 letter to Congress is as good

an example as any. A merchant interested in charging cash customers a lower price than credit card customers could grant the discounted price in two ways: First, the merchant could choose to ticket a product for $100, but then deduct $4 if a customer pays cash. Alternatively, the merchant could choose to ticket the product for $96, but then surcharge $4 if the customer pays with a credit card. The Federal Reserve Board has decided to treat these two forms of two-tier pricing completely differently. Under the Board's recently published regulations, a merchant who wants to use the deduction method is free to do so; but, by a 4-3 vote, the Board has decided that a merchant who wants to use the surcharge method is restricted from doing so. Thus, under the regulations, credit card issuers can continue to prohibit merchants from using credit card "surcharges" altogether, and, in addition, any merchant who wants to use the "surcharge" method is made subject to detailed Truth-in-Lending Act disclosure requirements. This was the position urged upon the Board by the credit card industry.

The Board's distinction between the "surcharge" and "deduction" methods of offering price differentials is unreasonable, and in fact the Board has offered no logical defense for it. These regulations misconstrue Congress' intent in passing § 167 and will block much beneficial two-tier pricing.



In adopting the credit card industry's position, the Board disregarded the arguments made by a broad cross-section of parties submitting Comments to the Board, including Chairman Proxmire of this Committee, the Antitrust Division of the Justice Department, the Federal Trade Commission, Atlantic Richfield Company, and Consumers Union. As these Comments all indicated, it is unreasonable to treat the two forms of two-tier pricing differently. If Congress does not act now to reverse the Board, § 167's efforts to encourage a two-tier pricing system that is fair and beneficial to cash customers will be undercut.

Recognizing that its approach may not have carried out the intent of Congress, the Board took the unusual step of writing to the relevant Congressional Committees asking for legislative clarification.[2/] There are at least five reasons that we believe that Congress should act now to assure that merchants are free to use the "surcharge" method of two-tier pricing.

First, whether a merchant "surcharges" when a customer uses a credit card, or "deducts" when a customer pays by cash, the economic effect on the individual consumer is the same,

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2/ Before issuing its final regulations, the Board itself had taken differing positions on the surcharge issue. In its first set of proposed regulations (April 30, 1975), the Board distinguished between surcharges and deductions. In its revised proposed regulations (July 30, 1975), the Board reversed itself and treated the two in the same way. In its final regulations, the Board reversed itself again.

and the benefits to cash customers are the same. In each system described by Chairman Burns, there are two prices, a cash price ($96), and a credit card price ($100).[3/] In each system, the cash customer receives a discounted price. The difference is simply one of form.

3/ In its Comments to the Federal Reserve Board, Atlantic Richfield has provided a useful example illustrating that in some situations it is impossible to tell whether a surcharge or deduction system is being used:

> "[c]onsidering two cases involving the same service station and the same customer. The station has two pump islands; one marked "Credit Customers," the other marked "Cash Customers." The first island charges, let us say, 52.5 cents per gallon for regular gasoline, the second 50 cents -- i.e., a 5% differential.
>
> In case No. 1, the customer drives up to the credit island and then decides to pay cash. When he tells the attendant he wishes to pay cash, he is advised to drive to the cash island, and that he is entitled to a 5% discount.
>
> In case No. 2, the customer drives up the cash island and then decides to use his credit card. He is advised to drive to the credit island, and the price will be 5% more.
>
> According to the [Federal Reserve Board] rules, the 5% is not a finance charge in the first instance, but would appear to be construed to be such in the second -- despite the fact that nothing has really changed between case No. 1 and case No. 2.
>
> We believe that legal distinctions based on terminology or semantic nuance are discriminatory and subjective. The Board should not attempt to restrict the manner in which the discount may be applied."

Second, to restrict "surcharges" will significantly restrict the use of beneficial two-tier pricing. Depending upon his marketing strategy, a merchant may prefer one form of two-tier pricing to another. For their own promotional reasons -- mainly the wish to advertise a rock-bottom cash price -- some merchants will prefer the surcharge method.[4/] The evidence presently available to Consumers Union -- and the evidence reflected in the Comments submitted to the Federal Reserve Board by Atlantic Richfield Company and the Federal Trade Commission as well -- indicates that some merchants would be willing to institute a cash discount system only if they can adopt the "surcharge" method. The credit card issuers -- who, for a decade, have prohibited merchants from using any form of two-tier pricing, and are now fighting particularly hard to continue their surcharge restrictions -- apparently also believe that, if the surcharge form of two-tier pricing is permitted, two-tier pricing stands a more likely chance of catching on. In short, a regulation disfavoring surcharges would deprive many consumers of beneficial two-tier pricing altogether.

Chairman Annunzio has suggested that, while the discount method is beneficial, the surcharge method would be

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4/ Other merchants might prefer to have a higher base price, but be able to advertise an appealing "X% off for cash." The different forms could have different impacts on sales, depending upon circumstances in a particular market.

used by merchants simply to penalize credit card customers without any benefit to cash customers. This, I respectfully submit, rests on a basic misunderstanding. Under the present system of single prices, a merchant's substantial credit card costs are generally reflected in higher prices charged to all customers, both cash and credit card; cash customers generally subsidize the costly credit card services. The point of two-tier pricing systems of any sort -- deduction or surcharge -- is to permit a reallocation of these credit card costs, so that people who use credit cards pay their own way, and cash customers save by no longer subsidizing others. The precise effect on prices of a two-tier pricing system will depend on factors peculiar to a specific store, but the effect on prices will be the same under either form of two-tier pricing, and cash customers benefit under either.[5/] As economic studies have indicated, the usual effect of either two-tier pricing system is likely to be that credit card customers will pay a little more and cash customers a little less than they would otherwise pay.[6/] In some other cases,

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5/ For some stores, the costs of cash and credit might turn out to be rather similar, and these stores may decide not to have any two-tier pricing at all. For many if not most stores, however, the costs of cash and credit are different, and it makes real sense to reallocate the costs of credit to those who use credit.

6/ Professor Dwight Jaffee of Princeton University's Economics Department and Thomas Russell of the University of Rochester School of Management have reached this conclusion in materials submitted to the Senate Banking Committee. See p. 10 infra.

prices to credit card customers will stay the same and prices to cash customers will fall.[7/] In some cases, where other inflationary factors are working their toll, prices to credit card customers will rise and cash prices will stay the same. But in this latter situation, a merchant would have raised his prices anyway, and without two-tier pricing he would have imposed a general price rise on all customers, both cash and credit card; instead, by allocating his credit card costs, the merchant benefits cash customers in this situation as well.

The suggestion that the surcharge system, unlike a cash deduction system, will be used to extract unreasonably higher prices from credit card customers is simply wrong, for two basic reasons. First, the retail market is one of the more competitive markets we have, and merchants will simply not be able to use surcharges to raise prices above the level necessary to effect the reallocation discussed above. Second, if a merchant did possess market power enabling it to use surcharges to raise prices above the competitive level, he would not need a surcharge to do so; he could inflate all his prices an equivalent amount under a "cash deduction" system, or, for that matter, he would have the market power to raise all his prices without instituting a two-tier pricing system at all. In short, in the retail market the fact that

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7/ This would be most likely to occur where virtually all of a store's existing customers pay by credit card. In this situation, there are virtually no cash customers to subsidize credit card costs, and a merchant's existing prices will already require credit card customers to pay their own way. Therefore, if a two-tier pricing system were implemented, the existing price would become the credit card price, and the cash price would be significantly lower.

a merchant's price is at a particular level and no higher implies that competition prevents him from raising the prices above that level, either directly or through a credit card surcharge. Credit card surcharges are no more open to abuse than cash deductions, and are just as beneficial to cash customers. Professor Dwight Jaffee of Princeton University and Thomas Russell of the University of Rochester, independent economists who have studied two-tier pricing in great depth, have concluded that merchants should be free to choose the method that they prefer; and we agree:

> "[T]here is no fundamental difference arising from the particular form of the two-tier mechanism. That is, the final outcome in terms of cash price and the credit card price should be the same independent of whether the tier is achieved through a discount or a surcharge.... [O]ur conclusion is that the two-tier system should allow retailers as wide a scope as possible, and this would include both cash discount and credit card surcharge mechanisms."8/

A third reason that the Federal Reserve Board's restrictions on surcharging should be reversed is that it was clearly Congress' purpose in passing § 167 to encourage both forms of two-tier pricing. In § 167 of the Act, Congress sought to

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8/ Letter to Senator Joseph Biden, October 9, 1975, pp. 2-3. See also their supporting paper, "The Effects of Credit Cards on Retail Pricing." Economists at the Antitrust Division of the Justice Department have reached a similar conclusion. See Comments of the Department of Justice, June 20, 1975, Before the Federal Reserve Board.

make it easier for merchants to charge cash customers less than credit card customers. There is not a shred of evidence in the statute or its legislative history that Congress wished to interfere with a merchant's decision concerning how to structure this two-tier pricing. There is not a shred of evidence that Congress disfavored the surcharge method, and sought only to facilitate the deduction method.[9/] Furthermore in passing § 167, Congress was particularly concerned that restrictions imposed on merchants by credit card issuers limited a merchant's freedom to price his goods as he wished, in violation of the antitrust laws. It is not

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9/ Chairman Burns' letter to Congress notes that the statute uses the words "cash discounts," but there is no suggestion anywhere in the legislative history that this phrase is meant to restrict the form of two-tier pricing by which the cash customer receives a lower price than a credit card customer. Given the Congressional purpose, it is clear that a cash customer receives a "cash discount" within the meaning of the statute when a merchant charges him a lower price than a credit card customer -- whether that lower price is a consequence of a "surcharge" or "deduction" system. See fns. 9-10 and pp.12-13 infra. In each case a cash customer perceives that he is receiving a discounted price. A distinction between two forms of granting cash customers a discounted price would have been completely arbitrary in light of the overall statutory purpose, and cannot be lightly imputed to Congress.

likely that Congress meant to permit restrictions on surcharges to continue in violation of the antitrust laws.[10/]

It is of great significance that Senator William Proxmire, the primary sponsor of the Fair Credit Billing Act, has explicitly stated that § 167 was designed to encourage both forms of two-tier pricing, and that the Federal Reserve Board's regulations frustrate the goal of the statute.[11/]

10/ The typical bank-merchant agreement prohibits surcharging; indeed it does so even more clearly than it prohibits deductions. See, also, Hearings Pursuant to H. Res. 66 Before the Subcomm. on Special Small Business Problems of the House Comm. on Small Business, 91st Cong., 2d Sess., at 217-46 (1970). In connection with the House Hearings, the Subcommittee sent out a questionnaire to credit card issuers around the country asking, inter alia, "Does your merchant credit card contract contain a provision precluding the merchant from granting discounts to customers on non-credit card sales?" Id. at 218, 220, 222. A large number answered affirmatively. Significantly, the phrase "discounts" in the questionnaire was interpreted to mean both forms of two-tier pricing in which cash customers are charged a lower price than credit card customers, i.e., surcharges as well as deductions.

11/ In Comments submitted to the Board on June 11, 1975, Senator Proxmire said:

> "I believe the Board misconstrues the intent of Congress in its treatment of discounts for cash payment. The proposed regulation, Section 226.4(i)(1), permits a merchant to offer and disclose a discount to customers who pay by cash rather than by credit card, without treating that discount as a finance charge subject to full Truth in Lending disclosure. But the following subsection 226.4(i)(2) denies similar treatment for any "surcharge" imposed on customers who do pay by use of a credit card. This distinction frustrates an important goal of the statute, namely to encourage merchants to impose the costs of their credit card plans on the people who use them, and to relieve cash customers of the burden of subsidizing

[Footnote Continued on Following Page.]

Furthermore, whatever they may say to this Committee today, the banking and credit card industry's testimony to the Senate Banking Committee before § 167 was passed explicitly states that the industry recognized that both forms of two-tier pricing were at stake in § 167:

> "Subsection (a) of these Sections would prohibit a card issuer from contracting with a card plan merchant to the effect that the merchant will not offer a discount to a cardholder to pay cash or check. Presumably, this section would ban both contracts (1) that prohibit a merchant from offering a direct discount for cash payment or, (2) that prohibit a merchant from imposing a 'transaction premium' on a purchase for which the card would be used as payment." 12/

[Footnote Continued From Preceding Page.]

the credit card operation It makes no functional difference whether merchants do this by emphasizing a base price ($105) from which a deduction ($5) is made for cash customers or by offering his wares at a base price $100 to which a surcharge ($5) is added for credit card customers. There is nothing in the legislative history to indicate that the statutory term "discount" was used only in the narrow, technical sense of a reduction from a state [sic] price and there is no apparent reason to force a merchant to use one marketing practice rather than another. Abuses are avoided by other constraints in the Act -- a 5% maximum, mandatory disclosure and administrative enforcement. I therefore urge the Board to withdraw the language of section 226.4(i)(2) and make it clear that a merchant is free to use either a "discount or "surcharge" method of separate pricing for cash and credit card customers."

12/ Joint Statement of the American Bankers Association, the Consumers Bankers Association, Interbank Card Association, and National BankAmericard, Inc., Hearings on S. 1630 and S. 914 Before the Subcommittee on Consumers Credit of the Senate Committee

[Footnote Continued on Following Page.]

See also Letter from Roland Brandel, Western Card Association, to Griffith Garwood, Federal Reserve Board, July 10, 1973 ("[t]he economic effect of these two alternatives, of course, is identical," and therefore "we assume that [the statute] is intended to apply equally to the situation where a merchant advertises and posts a cash price and then adds on a premium for use of a credit card.").

Beyond what has already been said, the surcharge form of pricing has two other advantages for the consumer. First, as the Federal Trade Commission points out in its Comments to the Board of June 30, 1975, the surcharge method, by its very nature, is likely to make the credit card customer particularly aware that he is paying an extra charge for credit. Thus, the underlying disclosure purposes of the Truth-in-Lending Act and of § 167 are especially well served by this method. In light of these purposes, it makes no sense for the Board to restrict a system of credit card surcharges. Deductions for cash are focussed on cash customers, and downplay the critical fact for Truth-in-Lending purposes -- that

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[Footnote Continued From Preceding Page.]

on Banking, Housing and Urban Affairs, 93d Cong., 1st Sess., at 250 (1973) (emphasis in original). The provisions concerning cash discounts in S. 1630 and S. 914 are identical to § 167 of the Fair Credit Billing Act.

credit card customers are, in effect, being charged extra. Given the disclosure goals of the Truth-in-Lending Act, the surcharge is a somewhat preferable system because it directly emphasizes to the credit card customer that he is paying a special extra charge. Some credit card issuers are particularly opposed to the surcharge method precisely because the surcharge would alert "their" customers to the extra charge for credit and induce a switch to cash payment. This industry reasoning only confirms that the purposes of the Truth-in-Lending Act and § 167 are particularly well-served by the surcharge method.

Second, the surcharge method may lead to increased competition among credit card issuers, which is surely in the public interest. Merchants who use surcharges may well add-on an amount equal to whatever they are charged by the particular credit card issuers whose card is being used. The charges imposed vary from issuer to issuer (and from merchant to merchant). If consumers are squarely faced with varying surcharges, they are more likely to use credit cards which will incur the least surcharge. This may well produce competition among credit card issuers to keep down their charges to merchants.

In sum, for the reasons set forth above, and set forth in the Comments submitted to the Federal Reserve Board by

Senator Proxmire, the Department of Justice, the Federal Trade Commission, Atlantic Richfield Company, and others, we believe that the Committee should not adopt Chairman Annunzio's proposed amendment, but rather should propose legislation which permits both forms of two-tier pricing.

Proposed Language Dealing With Surcharges

The objective described above could be achieved by either of two relatively simple amendments to § 167, and we present each for the Subcommittee's consideration:

Alternative 1:

Amend § 167 by adding the following new subsection (c), which simply clarifies the meaning of the word "discount" in §§ 167(a) and (b):

(c) For purposes of this section, a discount to induce payment by cash, check or similar means includes a charge added to the price generally available to purchasers of goods and services paying by cash, check, or similar means, which is imposed as a condition or consequence of the use of a credit card with

respect to a transaction involving such goods or services.

Alternative 2:

In its revised proposed regulations of July 30, 1975, which did not distinguish between surcharges and deductions, the Federal Reserve Board used the phrase "price differential" instead of the word "discount." As long as the Committee Report explains the significance of the change, the present confusion could be remedied simply by amending §§ 167(a) and (b) to replace the word "discount" with the phrase "price differential."

2. Usury

Chairman Annunzio's proposed legislation addresses a second problem, and, with one caveat, Consumers Union is happy to support the proposal. Credit card issuers have argued that they, and perhaps merchants as well, may run afoul of state usury laws if the merchant chooses to implement a cash discount pricing system. As a matter of policy, we see no reason why there should be any usury liability in these limited circumstances, and we think that usury obstacles are inconsistent with Congress' goal in passing § 167. As a matter of existing

law, however, the situation is generally uncertain and there may in face be usury problems in some states -- more clearly for issuers, but for merchants as well in some states. Therefore, to remove the existing uncertainties, we support Chairman Annunzio's carefully limited federal legislation that would insultate issuers and merchants from state usury problems in the narrow pricing situations covered by § 167 of the Fair Credit Billing Act.

We have three main reasons for reaching this conclusion. First, it does not seem fair to subject a credit card issuer to usury liability in these circumstances when an independent merchant has decided to institute a two-tier pricing system. If the issuers want usury protection in this limited situation, we are not opposed.

Second, with respect to merchants, Congress has already determined in § 167 that cash discounts would be beneficial to consumers and that merchants in all states should be free to institute two-tier pricing.[13/] If state usury problems are permitted to block or discourage merchants from giving

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13/ In describing § 167, the Senate Banking Committee report states:

> "The bill would provide some relief to cash customers possibly by prohibiting agreements between card issuers and merchants which forbid the merchant to offer a discount to cash customers. The legislation does not require merchants to offer discounts to cash buyers, but it does give them the option of offering a discount if they so desire."

cash discounts, § 167 is reduced to a nullity and consumers will not benefit at all.

If Congress does not preempt any state usury obstacles in these limited, special circumstances, there will be so much uncertainty and confusion about potential usury liabilities of merchants that the cash discount movement will be badly hurt. Uncertainties about their usury liabilities will frighten and discourage some merchants who are considering two-tier pricing. Credit card issuers have already suggested that merchants not give cash discounts if they wish to avoid breaching state usury laws -- not a surprising strategy for an industry that has tried to stop cash discounts by one tack or another for years. Moreover, as I have already stated, Consumers Union itself expects shortly to launch a major cash discount campaign. As part of the campaign, consumers intend to visit stores in many communities to try to persuade merchants to grant cash discounts. We obviously do not want to encourage merchants to take any step which would subject them to a substantial risk of violating the law. To require the usury issue to be resolved on a state-by-state basis would be full of uncertainties and would be terribly burdensome and confusing. A uniform federal approach should be adopted to clear the air and give cash discounts a chance.

Congress has already eliminated several significant obstacles to cash discounts, and removing this one additional

obstacle merely implements existing legislative policies. Thus, in § 167 Congress eliminated contractual restraints to cash discounts, and also eliminated Truth-in-Lending Act obstacles to cash discounts by exempting most cash discounts from detailed Truth-in-Lending disclosures. Indeed, in § 167 (b) Congress has explicitly determined that a cash discount should not be viewed as a cost of credit for Truth-in-Lending Act purposes. Similarly, it should not be viewed as a cost of credit for state usury purposes. Congress' failure to preempt state usury laws in the § 167 situation is an oversight that should be corrected, consistent with established Congressional policy to remove obstacles to cash discounts.

Third, and finally, a very narrow and limited preemption of state usury laws is all that is required. Therefore, we are confident that a special exemption here would not erode basic usury principles, any more than § 167's existing exemption from the Truth-in-Lending Act is an erosion of basic Truth-in-Lending principles. Chairman Annunzio's proposal mandates an extremely narrow preemption tied explicitly to § 167 price differentials. Thus, it is carefully limited to narrow circumstances that have already received Congressional blessing in § 167, where the price differential is 5% or less and the differential is clearly and conspicuously disclosed

to all customers. Under these circumstances, we would support a preemption of state usury laws.

We are concerned, however, about one matter connected with this usury question, which we believe Congress should address in any legislation preempting State usury laws. In recent testimony before the Senate Banking Committee, credit card issuers indicated that they may try to inhibit merchants from giving cash discounts by making merchants believe that they will incur substantial state usury liabilities if cash discounts are offered. Therefore, Consumers Union believes that if legislation is passed preempting state usury laws in the cash discount situation, issuers should be required to inform merchants that there are, in fact, no usury obstacles to cash discounts.

In their testimony before the Senate Committee, the card issuers described their concern about possible state usury problems if merchants who accept their cards decide to offer cash discounts. The issuers stated that they were considering various steps to protect themselves pending possible federal legislation preempting these state usury laws. One such step is to inform merchants that both merchants and issuers face potential usury problems if the merchant offers cash discounts, and furthermore to require the merchant to hold the issuer harmless for any of the issuer's potential liabilities. The effect of such a notice from issuers to merchants

is likely to be devasting: merchants will be so frightened of financial liabilities that they will simply offer no cash discounts at all, and the issuers will have achieved indirectly what their flat prohibition on discounts has hitherto achieved directly.

In many if not most jurisdictions these usury fears have, in Consumers Union's view, been greatly exaggerated. But merchants will not know this. They will simply be told of potentially large liabilities.

Consumers Union is supporting the narrow preemption of state usury laws requested by the card issuers, because there do appear to be usury problems in some jurisdictions and because in other jurisdictions usury uncertainties are likely to inhibit merchants from offering discounts. But if the issuers' potential usury problems are eliminated by federal legislation, there is absolutely no justification for issuers imposing hold harmless clauses on merchants or for their employing any other devices that will make merchants fear usury liabilities.

Therefore, in Consumers Union's view, any issuer that has sent a contract to a merchant containing a hold harmless clause, or that has otherwise suggested to merchants that cash discounts may create usury liabilities from cash discounts, should be required to notify merchants that state usury laws

have been preempted in this context and that merchants, in fact, have no usury problems. We think that this should be an explicit part of any federal legislation preempting state usury laws. If protection against state usury laws is granted, as the issuers request, the issuers should not be allowed to continue to let merchants think that there are potential usury problems and hold harmless liabilities. The Federal Reserve Board has already required issuers to send out notices to merchants repudiating contractual provisions which explicitly prohibit cash discounts. No other notices are presently required. Additional legislation is appropriate to assure that additional notices concerning the usury situation are sent out promptly.

Proposed Language Dealing With Usury

Consumers Union proposes that the following sentence be added to Chairman Annunzio's proposed amendment to § 171 of the Fair Credit Billing Act, as a continuation of § 171(e):

> Within 30 days of the effective date of this subsection, any card issuer which has previously notified any person about usury liability in connection with the offering of discounts for payment by cash, check or similar means, whether by

contract containing a hold harmless clause or otherwise, shall inform such person that there are no usury liabilities in connection with the offering of any discount under § 167(b).

Mr. ANNUNZIO. Thank you for your statement, Mr. Gewirtz.

Now, we'll hear from David R. Roll, representing Atlantic Richfield Co.

STATEMENT OF DAVID L. ROLL, STEPTOE & JOHNSON, ON BEHALF OF ATLANTIC RICHFIELD CO.; ACCOMPANIED BY HERBERT BERMAN, ATTORNEY, ATLANTIC RICHFIELD CO.

Mr. ROLL. Thank you, Mr. Chairman. I, too, have condensed our written statement down to about 10 minutes, I believe.

I'm with the law firm of Steptoe & Johnson, appearing today with Herbert Berman, attorney for Atlantic Richfield Co. Section 167 of the Fair Credit Billing Act was intended to prohibit restrictions imposed by credit card issuers on participating merchants and to accord them flexibility to adopt pricing systems whereby cash customers may be charged lower prices than credit card customers.

Atlantic Richfield supports this objective. However, like Consumer's Union, Atlantic Richfield is convinced that the objectives of section 167 will be frustrated unless Congress enacts legislation to clarify the provision in two important respects. First, we think it should be made clear in 1967 that a merchant in a credit card system may, without triggering detailed disclosure requirements of truth-in-lending, freely choose to adopt flexible two-tier pricing systems. Two-tier pricing would enable a merchant to encourage cash purchases by granting a discount to cash consumers or by imposing a surcharge on credit card consumers.

Second, due to the fact that some State laws which set finance charge rate ceilings may prevent the implementation of two-tier systems, Congress should preempt the application of such State laws to the extent they are inconsistent with the objectives of 167. H.R. 10209 now before this subcommittee addresses these two concerns. H.R. 10209 provides for preemption of inconsistent State laws, an objective which we support. By stimulating pricing flexibility among participating merchants, such legislation could promote competition among credit card issuers with a result of cost saving to card consumers as well. Atlantic Richfield's concern with effective implementation of 167 is more than academic. Unless the provisions of 167 can be implemented by allowance of a surcharge to credit card users as well as by a discount to cash customers, unless the uncertainties surrounding the effect of the inconsistent State laws are eliminated it is our view Atlantic Richfield's branded dealers as well as other merchants are unlikely to implement any form of two-tier pricing.

We believe our branded dealers must have the flexibility to engage in either form of pricing. From a marketing standpoint the dealers are likely to prefer the surcharge method because the focus of their advertising and sales efforts would rest on a low cash price. Additionally a distinction between a surcharge to a credit card user and a discount to a cash customer appears to be more a semantic confusion than an economic reality. In the event that only a discount off the regular price is permissible many merchants including perhaps many of Atlantic Richfield's dealers whose point of sale prices may fluctuate frequently will find it difficult to know whether they are offering a dis-

count or whether they are imposing a surcharge. It is therefore reasonable to expect that they would forego any attempt at two-tier pricing rather than risk inadvertent truth-in-lending violations.

Let me illustrate the point by bringing to your attention two cases involving the same service station and the same customer. The station has two pump islands, one marked "credit customers"; the other marked "cash customers". In case one, the customer drives up to the credit island and then decides that he wants to pay cash. He tells the attendant he wishes to pay cash. He's advised to drive to the cash island where he is entitled to a 5-percent discount. In case two, the customer drives up to the cash island and then he decides to use his credit card. He's advised to drive to the credit island where the price will be 5 percent higher.

Now, according to the surcharge discount distinction, 5 percent is not a finance charge in the first case but would be, at least it would appear to be construed as such, in the second case despite the fact that there is absolutely no economic difference between the two cases.

Now, it comes as no surprise that Chairman Burns has characterized the problems generated by these surcharge/discount distinctions as perplexing and it would be no more a surprise to find that independent businessmen faced with a perplexing past of granting discounts without exacting surcharges may determine the water is too murky for any form of two-tier pricing. Atlantic Richfield believes that beyond a more equitable allocation of credit card costs and beyond maximizing the flexibility of point of sale businessmen, the allowance of broad discretion in two-tier pricing should result in competition among credit card issuers benefiting credit card users as well as cash customers.

If merchants are permitted to adopt two-tier pricing and if marketing strategies dictate an emphasis on a low cash price with a surcharge for credit card use, two important and related economic consequences would result. First, by high-lighting the fact that credit card use costs money, the underlying disclosure policies of truth in lending are well served.

As the Assistant Director for Special Statutes at the Federal Trade Commission observed in his comments to the Federal Reserve Board and I quote: "The use of the surcharge method would bring home graphically to the credit card customer full cost of his decision to defer payment thereby fulfilling one purpose of the Truth-in-Lending Act." The increased emphasis on the cost of credit should also exert downward pressure on the price of credit; and this is the second economic consequence.

Credit card users will begin to shop the market. Credit card issuers could be expected to adjust their discount charge to participating merchants accordingly. Obviously, with less credit costs to pass on, the surcharge to card users could be reduced. It has been suggested that allowing surcharge to be imposed on credit card users will have an inflationary impact. This argument appears to be premised on the assumption that cash prices, those which include allocated credit card costs, will be rigidly fixed. Thus the argument goes a surcharge added to credit card transactions will be a double dip for merchants with no benefit to cash customers and an additional burden falling on credit card users.

The operation of market forces suggest a contrary result. When sellers in various markets are given the flexibility envisioned by workable two-tier pricing they are able to obtain cost savings. The practice of surcharging credit card users permitting a more equitable targeting for the allocations of costs should result in cost reductions in a merchant's cash sales market. This makes cash price reductions economically feasible. When competition is factored in, the price competition is likely.

With regard to the issue of preemption, Atlantic Richfield is convinced that effective implementation of the important national policy embodied in 167 requires the elimination of any conflicts which may exist with potentially inconsistent State laws. Thus, we believe it's critical that the Congress act to preempt such laws. In this regard, Atlantic Richfield supports the purpose of section 4 of H.R. 10209 which is to preempt the applicability of State laws so merchants may implement a discount form of two-tier pricing. However, consistent with our position favoring an allowance of a surcharge method of two-tier pricing, Atlantic Richfield believes that the preemption provision of H.R. 10209 should apply to surcharge methods.

To summarize, Atlantic Richfield endorses the purpose of 167 of the Fair Credit Billing Act. We urge Congress to enact clarifying legislation to accomplish that purpose. We commend this subcommittee for expediting consideration of the two problem areas most in need of clarification. Atlantic Richfield endorses the provision in H.R. 10209 which recognizes the need for preemption. By prohibiting the surcharge method of two-tier pricing, however, Atlantic Richfield believes that H.R. 10209 would not alleviate the confusion now surrounding 167.

This concludes my statement. Mr. Chairman.

[The prepared statement of Mr. Roll on behalf of Atlantic Richfield Co., follows:]

STATEMENT OF ATLANTIC RICHFIELD COMPANY

AT HEARINGS ON CREDIT CARD

SURCHARGE LEGISLATION

Before the

Subcommittee on Consumer Affairs of

the Banking, Currency and Housing

Committee of the House of Representatives

October 23, 1975

By: David L. Roll, Esq.
Steptoe & Johnson

STATEMENT OF ATLANTIC RICHFIELD COMPANY
AT HEARINGS ON CREDIT CARD SURCHARGE
LEGISLATION

I. THE NEED FOR CLARIFYING LEGISLATION

Section 167 of the Fair Credit Billing Act[1/] was intended to prohibit restrictions imposed by credit card issuers on the pricing discretion of participating merchants and to accord them the flexibility to adopt pricing systems whereby cash customers may be charged lower prices than credit card customers. Atlantic Richfield Company ("Atlantic Richfield") supports this objective. However, like Consumers Union of United States, Inc., Atlantic Richfield is convinced that the objectives of § 167 will be totally frustrated unless Congress enacts legislation to clarify the provision in two important respects:

First, it should be made clear in § 167 that a merchant in a credit card program may, without triggering the detailed

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1/ Pub. L. 93-495 (1974), effective October 28, 1975, 88 Stat. 1515, 15 U.S.C. 1666f. § 167 and other provisions relating to Fair Credit Billing were added without debate by Amendment No. 1438 to H.R. 1121 by Senators Brock and Proxmire. Cong. Rec. - Senate, June 13, 1974 at S. 10567. Subsequently, H.R. 1121 was enacted into law as Pub. L. 93-495. The Fair Credit Billing portions of Amendment No. 1438 were identical to S. 2101 which was passed by the Senate on July 23, 1973 but never enacted into law. § 167 of S. 2101, dealing with cash discounts, was identical to corresponding provisions in S. 1630 and S. 914 with respect to which hearings were held in the Senate in 1973.

disclosure requirements of the Truth-in-Lending Act, freely choose to adopt flexible "two-tier pricing" systems.[2/] Such two-tier pricing would enable a merchant to encourage cash purchases by granting a "discount" to cash customers or by imposing a "surcharge" on credit card customers.

Second, due to the fact that some state laws which set finance charge rate-ceilings may prevent the implementation of any two-tier pricing system, Congress should preempt the possible application of such state laws to the extent they are inconsistent with the objectives of § 167.

H.R. 10209 -- now before this Subcommittee for consideration -- addresses these two concerns. H.R. 10209 provides for preemption of potentially inconsistent state laws, an objective which Atlantic Richfield strongly supports. However, since the bill also prohibits the "surcharge" method of pricing, thus impairing the implementation of flexible two-tier pricing systems, Atlantic Richfield believes that the apparent purpose of § 167 would be undermined by H.R. 10209. For this reason, we urge that in addition to preempting the possible application of certain state laws to § 167 price

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2/ "Two-tier pricing" as used herein refers to pricing by merchants pursuant to which cash customers pay less than credit card customers for the same goods and services. Thus, a two-tier pricing system could involve a "discount" for cash customers or, in the alternative, the economic equivalent -- a "surcharge" for credit card customers.

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differentials, Congress should specifically allow -- not prohibit -- a "surcharge" method of two-tier pricing in the credit card context.

In Atlantic Richfield's view, such clarifying legislation -- essentially fortifying the fundamental purpose of § 167 and preempting potentially inconsistent state statutes -- would pave the way for substantial consumer benefits. Cash customers could be relieved of the burden of subsidizing the credit transactions of others. Moreover, by stimulating pricing flexibility among participating merchants, such legislation could very well promote competition among credit card issuers with a resulting cost savings to card-using consumers as well.

Atlantic Richfield's concern with effective implementation of § 167 is more than academic. Unless the provisions of § 167 can be implemented by allowance of a surcharge to credit card users, as well as by a discount to cash customers, and unless the uncertainties surrounding the effect of potentially inconsistent state laws are eliminated, it is our view that Atlantic Richfield's branded dealers, as well as other merchants, are unlikely to implement any form of two-tier pricing. Simply put, we believe our branded dealers must have the flexibility to engage in either form of pricing.

From a marketing standpoint, the dealers are likely to prefer the surcharge method because the focus of their advertising

and sales efforts would most effectively rest on a lower "cash" price.[3/] Additionally, a distinction between a "surcharge" to a credit card user and a "discount" to a cash customer appears to be more a semantic confusion than an economic reality. In the event that only a "discount" off the "regular price" is permissible, many merchants -- including Atlantic Richfield's dealers -- whose point-of-sale prices may fluctuate frequently, will find it difficult to know whether they are offering a "discount" or imposing a "surcharge". It is therefore reasonable to expect that they would forego any attempt at two-tier pricing rather than risk inadvertent "surcharging" and the attendant Truth-in-Lending Act violations.

II. TWO-TIER PRICING

Today's § 167 was enacted for the purpose of permitting merchants participating in credit card arrangements the flexibility of pricing their goods or services at two distinct levels:

3/ At least 65% of Atlantic Richfield's branded gasoline is sold to cash customers. Under a discount method of two-tier pricing, promotional efforts are likely to focus on the higher "credit" price with a discount for cash customers. This would subvert the general disclosure goals of the Truth-in-Lending Act, as well as the purpose of § 167, because it would de-emphasize the fact that credit customers are paying a higher charge.

one price available to cash customers, and a second price, reflecting credit card system costs, available to credit card users.

Extensive hearings before a Subcommittee of the House of Representatives[4/] made it plain that because most credit card issuers exact a "discount" charge from participating merchants, and have historically coupled that practice with contractual restrictions prohibiting the merchant from "passing on" this charge to credit card holders, cash paying customers have been subsidizing the allocated costs of purchases by credit card holders while receiving no benefit. Additionally, government antitrust enforcers pointed out that such restrictions on merchants' independent pricing decisions may well constitute price-fixing agreements in violation of the antitrust laws.[5/]

In order to remedy these difficulties -- and indeed encourage two-tier pricing -- § 167(a) was enacted to expressly prohibit restraints on a merchant's freedom to charge lower

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4/ Hearings Pursuant to H. Res. 66 Before the Subcommittee on Special Small Business Problems of the House Committee on Small Business, 91st Cong., 2d Sess. (1970).

5/ Id. at 173 (Walter Comegys, Antitrust Division, Department of Justice), and at 138 (William Dixon, Federal Trade Commission).

prices to cash paying customers.[6/] To further induce merchants to adopt two-tier pricing in cash/credit-card situations, 167(b) was enacted to provide that any discount not in excess of 5% which is offered to all prospective buyers will not be considered a "finance charge" for purposes of triggering Truth-in-Lending Act disclosure requirements.

In promulgating regulations to implement the provisions of the Fair Credit Billing Act, the Federal Reserve Board was called upon in recent months to consider the scope of two-tier pricing permissible under § 167. Specifically, the question emerged whether the term "discount" should be construed to include <u>any</u> price differential even if characterized as a surcharge to a credit card user rather than a discount to a cash paying consumer.[7/]

6/ Since the apparent reason for the issuers' restrictions was to prevent merchants from passing on the issuers' discount <u>charge</u> to cardholders and because Congress sought in § 167 to prohibit such restrictions by issuers, the word "discount" as used in § 167 is a short-hand term for surcharge or discount. Thus, the word "discount" in § 167 finds its origin in the issuers' discount charges which, in reality, are surcharges for credit card services.

7/ Federal Reserve Board Chairman Burns, in a letter of September 16, 1975 to Senator Biden, summarized the Board's deliberations:

> "On April 30, 1975, the Board published proposed regulations [relating to 'discount'

[cont'd on p. 7]

Atlantic Richfield's position -- as presented to the Federal Reserve Board, the Subcommittee on Consumer Affairs of the Senate Banking Committee and now to this Subcommittee -- is that in order to permit the pricing flexibility intended by § 167, and thus eliminate the subsidy for credit card users by cash paying consumers, effective two-tier pricing must include the "surcharge" option as well as the "discount" option.

7/ [cont'd from p. 6]

> and 'surcharge' differentials] that would have excluded the second type of differential from the special treatment provided by the statute. On July 30, 1975, the Board published revised proposals taking the opposite position. Chairman Proxmire of the Senate Banking Committee has urged that the 'premium' or 'surcharge' differential be treated as a 'discount'. Chairman Annunzio of the Consumer Affairs Subcommittee of the House Banking Committee has urged that it not be treated as a 'discount' within the meaning of the statute.
>
> After extended consideration the Board decided by a 4-3 vote to approve a regulation that excludes the second type of price differential from the special treatment provided by the statute. The Board unanimously agreed to seek your assistance in obtaining express legislative action that would make clear the intended application of Section 167 of the statute. The lack of such clarifying action, with attending differences of opinion as to Congressional intent, may well lead to costly litigation and impose substantial burdens on creditors, consumers and the courts."

Atlantic Richfield urges this position for a number of reasons. First, as suggested above, there is no real economic difference between the surcharge and discount forms of two-tier pricing. Indeed, the use of such a distinction can only be expected to defeat the intent of § 167 by causing confusion and uncertainty in the marketplace, thus forcing merchants to the conclusion that sbstention from all forms of two-tier pricing is preferable to the risk of inadvertent law violation.

To illustrate the point, consider two cases involving the same service station and the same customer. The station has two pump islands; one marked "Credit Customers", the other marked "Cash Customers". The posted price at the cash island is 5% less than the credit island price.

In case No. 1, the customer drives up to the credit island and then decides to pay cash. When he tells the attendant he wishes to pay cash, he is advised to drive to the cash island where he is entitled to a 5% discount.

In case No. 2, the customer drives up to the cash island and then decides to use his credit card. He is advised to drive to the credit island where the price will be 5% higher.

According to a "surcharge/discount" distinction, the 5% is not a finance charge in the first case, but would appear to be construed as such in the second -- despite the fact that there is absolutely no economic difference between case No. 1

and case No. 2. The problem is even further complicated since retail gasoline prices fluctuate over time and, therefore, there may be no "regular" price.

It is therefore no surprise that Chairman Burns has characterized the problems generated by the "surcharge/discount" distinction as "perplexing."[8/] And it would be no more a surprise to find that independent businessmen -- faced with the perplexing task of granting "discounts" without exacting "surcharges" -- may simply determine that the water is too murky for any form of two-tier pricing.

Additionally, Atlantic Richfield believes that beyond a more equitable allocation of credit card costs, and beyond maximizing the pricing flexibility of point-of-sale businessmen, the allowance of broad discretion in two-tier pricing should result in enhanced competition among credit card issuers, ultimately benefiting credit card users as well as cash customers.

If merchants are permitted to adopt two-tier pricing and if marketing strategies dictate an emphasis upon a low cash price with a surcharge for credit card use, two important and related economic consequences should result. First, by highlighting the fact that credit card use costs money, the

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8/ Letter of September 16, 1975, Chairman Burns to Senator Biden, supra.

underlying disclosure policies of the Truth-in-Lending Act are well served.[9/] Second, as a function of the same free market economic principle which is the primary rationale for Truth-in-Lending disclosures -- that is, as a buyer acquires more knowledge of the market his purchasing decisions become more rational --

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9/ It has been suggested by some that a "surcharge" price differential would subvert, rather than serve, the underlying purposes of the Truth-in-Lending Act. This argument evidently rests on the observation that any exemption from the disclosure requirements provided in the Truth-in-Lending Act undermines the basic policy embodied in that statute. A direct look at the purpose and effect of the two-tier pricing exemption in the credit card context plainly refutes this notion. Prior to the implementation of § 167, any cost of credit card processing passed on to the consumer by the merchant has likely been totally hidden. As indicated above, with uniform pricing at the point-of-sale level, the cost of credit remains unallocated, thus undisclosed. On the other hand, in the case of two-tier pricing -- particularly with a "surcharge" method -- disclosure of the fact that credit has a cost does, indeed, emerge.

Additionally, the final regulations implementing § 167 provide for price differential disclosures, both by point-of-sale postings and in all advertising alluding to the availability of credit. Federal Reserve Board Regulations § 226.4(i)(1)(ii) and (iii). In short, the narrow exemption provided by § 167 can function to stimulate credit disclosures where otherwise none are forthcoming. As the Assistant Director for Special Statutes, Federal Trade Commission, observed at page 2 of his comments to the Federal Reserve Board dated June 30, 1975: ". . . the use of the surcharge method would bring home graphically to the credit card customer the full cost of his decision to defer payment, thereby fulfilling one purpose of the Truth-in-Lending Act."

the increased emphasis on the cost of credit should exert downward pressure on the price of credit. In short, credit card users will begin to "shop the market." As market-generated downward price pressure is a trigger to price competition, credit card issuers could be expected to adjust their "discount charge" to participating merchants accordingly. Obviously, with less credit costs to "pass on", the surcharge to card users could be reduced.

It has been suggested that allowing surcharges to be imposed on credit card users will have an inflationary impact. This argument appears to be premised on the assumption that previously established cash prices -- those which include allocated credit card costs -- will be rigidly fixed. Thus, the argument goes, a surcharge added to credit card transactions will be a "double-dip" for merchants, with no benefit to cash customers and an additional burden plainly falling on credit card users. In essence, this argument ignores the forces of competition and assumes that either all merchants are unaffected by competitive forces or that all will engage in price-fixing agreements with their competitors.

The operation of free market forces suggests a contrary result. When sellers in various markets are given the flexibility envisioned by workable two-tier pricing, they are, in effect, able to obtain cost savings. The practice of surcharging credit card users, permitting, as it does, a more

equitable targeting for the allocation of credit card processing costs, should result in cost reductions in a merchant's cash sales market. This makes cash price reductions economically feasible. When competition from other merchants in a given market is factored in, price competition is not only feasible, it is likely.

III. PREEMPTION OF POTENTIALLY INCONSISTENT STATE LAWS

Section 4 of H.R. 10209 provides that any discount properly offered under § 167(b)

> ". . . shall not be considered a finance charge or other charge for credit under the laws of any state relating to disclosure of information in connection with credit transactions, or relating to the types, amounts or rates of charges, or to any element or elements of charges permissible under such laws in connection with the extension or use of credit."

Atlantic Richfield supports this section of H.R. 10209, with the caveat that § 167 -- thus, the preemption provision as well -- should clearly include the "surcharge" method of two-tier pricing.

Atlantic Richfield is convinced that effective implementation of the important national policy embodied in § 167 requires the elimination of any conflicts which may exist with potentially inconsistent state laws. Thus, it is critical that the Congress act specifically to preempt such laws.

The problem is this: most state jurisdictions have enacted statutes relating to retail installment sales, or to money lending in general, which place a ceiling on permissible finance charges. A "surcharge" or a "discount" pursuant to § 167 may be construed in some of these states to be a "finance charge" for purposes of these rate ceilings -- despite the fact that the differential reflects, not an addition to the cost of credit, but merely a better allocation of that cost. Given the multiplicity of jurisdictions, these statutes, absent specific preemption, will plainly pose a barrier to the pricing § 167 was designed to encourage.10/

In the Fair Credit Billing Act, Congress specifically preempted ". . . the laws of any state with respect to credit

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10/ It is important to note that these state statutes present a barrier to effective implementation of § 167 even if only a "discount" option were to be provided. This follows from the lack of substantive economic difference between surcharging a credit card holder and discounting a cash customer. As Chairman Burns observed in his September 16, 1975 letter to Senator Brock:

> ". . . in connection with credit cards issued in some States it may be difficult for merchants to offer a cash discount of the sort covered by Sec. 167 without running afoul of usury laws of the card issuer's State, and . . . a card issuer acquiring credit card paper might be unable to determine from the paper whether it violated such laws."

billing practices" to the extent inconsistent with the amendments.[11/] Further, the Federal Reserve Board was delegated specific authority to determine by regulation what constitutes "inconsistency".[12/] It has been argued that this statutory language is sufficient to allow the Board to preempt. However, there is serious question whether the state rate-ceiling laws are "credit billing practice" statutes within the meaning of § 171. Thus, Atlantic Richfield is of the view that language specifically covering the preemption of such laws would afford maximum clarity and hence remove a substantial barrier to effectuating the purpose to be served by § 167.

As Chairman Burns recently pointed out in reference to the difficulties state usury laws may present for merchants desiring to adopt § 167 price differentials:

> "If Congress considers that such laws are inconsistent with the purpose of Sec. 167, we believe that it would be appropriate for it to consider preempting such laws to that extent, . . ." 13/

11/ § 171(a).

12/ Id.

13/ Letter of September 16, 1975, Chairman Burns to Senator Brock, supra.

IV. CONCLUSION

Atlantic Richfield strongly endorses the purpose of § 167 of the Fair Credit Billing Act. We urge the Congress to enact clarifying legislation to accomplish that purpose.

We commend this Subcommittee for expediting consideration of the two problem areas most in need of clarification. Atlantic Richfield endorses the provision in H.R. 10209 which recognizes the need for preemption of potentially inconsistent state laws. However, by prohibiting the "surcharge" method of two-tier pricing, Atlantic Richfield believes that H.R. 10209 would not alleviate the confusion now surrounding § 167.

Mr. ANNUNZIO. Thank you very much for your statement. And, as I previously announced, if you two gentlemen will move to the side, we are going to question all five panelists in the sake of time.

But I want you to remain up front. We want to ask some questions.

Now, our third panel: Ken Larkin, senior vice president of the Bank of America, representing the American Bankers Association; Maurice Segall, president of the card division, American Express; John Dillon, executive vice president of National BankAmericard; and Michael Maw, general counsel of Interbank Card Association.

STATEMENTS OF KENNETH V. LARKIN, SENIOR VICE PRESIDENT, BANK OF AMERICA, SAN FRANCISCO, ON BEHALF OF THE AMERICAN BANKERS ASSOCIATION

Mr. ANNUNZIO. Mr. Larkin, I ask unanimous consent that your entire statement be made a part of the record, and you can proceed for 10 minutes.

Mr. LARKIN. This statement, if I were to read it word for word, would take about 17 or 18 minutes, so I will try and summarize it, submitting it for the record.

I am Kenneth V. Larkin, senior vice president, bank of America, San Francisco. I am also vice chairman of the bank card division of the American Bankers Association, a trade group comprising 96 percent of the Nation's 14,000 banks, and I am here to present the views of that organization.

I have the primary responsibility for running the BankAmericard operation of the Bank of America, which encompasses approximately 19 percent of all bank credit card sales in the United States; and I say that in case someone wants to ask a pragmatic question.

And I would also like to respond, perhaps in dialog, to what I consider some misstatements of fact made by the prior witness.

We want to applaud the chairman of this subcommittee for responding quickly to the problem sections of this act, which have only been recently identified but will take effect on October 28. Such attentiveness by the chairman in the subcommittee to the problems experienced by consumers in their efforts to obtain credit is welcomed by consumers and lenders alike, particularly in this instance where the problem affects both groups.

We recognize the basic thrust of the Annunzio proposal. H.R. 10219 is twofold.

First, the proposal precludes any interpretation of section 167 of the Fair Credit Billing Act as authorizing surcharges.

Additionally, this amendment would forbid the imposition of a surcharge on any credit card purchase.

Second, it provides relief to those lenders in States where local law conflicts with the cash discount provisions of section 167 of the Fair Credit Billing Act.

We would like to comment on both of those two important issues.

Section 2(p) clarifies the congressional intent that the term, "discount," as used in section 167 of the Fair Credit Billing Act, should not also mean a surcharge.

We are pleased that a legislative effort is being made to clarify this issue so as to end further discussion of what the actual legislative

intent was meant to be, notwithstanding clear language regarding cash discounts in section 167 of the Fair Credit Billing Act.

In this regard I could add that truth-in-lending still troubles us day to day as different interpretations are made and we have to go to the Fed to ask for clarification and protect our rear against class action suits by some clever interpretation of what we thought was the law.

If Congress meant to authorize the use of surcharges, the drafters of the legislation simply would have provided language to that effect. The passage of section 2(p) of the Fair Credit Billing Amendments of 1975 would put an end to needless debate on that issue.

The additional step taken in section 3 to prohibit the imposition of a surcharge on a consumer using a credit card in lieu of cash payment is a necessary directive. Most importantly, such a provision prevents an increase in the cost of credit for millions of persons. Equally important, such a provision preventing surcharges assures the continued vitality of the bank card industry as a source of consumer credit.

The distinction between surcharges and discounts has been difficult for some persons to perceive. This difficulty in perception has obviously not been shared by Chairman Annunzio. The difficulty arises only in the minds of some ivory tower economists who don't work in the marketplace.

It is, then, in support of this effort to prohibit any authorization of the imposition of surcharges that we address an important portion of these comments. In the course of trying to clarify the distinction in the two concepts, we would like to disspell a theory which is used in support of both surcharges and discounts.

We refer to the theory that the merchant discounts paid by retailers are a cost of business which must be passed on to increase prices to all buyers, both cash and credit.

And I am going to summarize here, but essentially a Federal research study indicated and concluded that the merchant instituting credit cards for his existing internal credit operations would find the credit card discount substantially less than the costs incurred in extending retail credit independently. A study by the CPA firm of Toush, Roch, et cetera, and a more current study by Columbia shows clearly that the cost of credit for small operations runs as high as 8 percent. When a bank card comes in and supplants that with a 3-percent charge, actually the merchant, if he wishes, could lower his prices to the cash buyers. And that has been the effect of——

Mr. ANNUNZIO. Could you hold up while we go and make this vote and come back?

Mr. LARKIN. Sure.

Mr. ANNUNZIO. In other words, I want to get the full impact of all your statements in one sitting, if I possibly can. I hope I am not inconveniencing you, Mr. Larkin. You are making a very interesting statement, and I want all the members to hear it.

Let's go together and come back.

[After recess.]

Mr. ANNUNZIO. The meeting of the subcommittee will come to order.

Again, I apologize for the interruptions, but we are achieving a little bit of normalcy on the floor, I hope. We passed the rule, and it is going to the Committee as a Whole, and so I am hoping we will not be interrupted now for the next 40 minutes.

Mr. LARKIN?

Mr. LARKIN. I will just summarize the conclusion that the advent of credit cards has not caused an increased cost in merchandise, and this premise should be evaluated before providing a legislative penalty for using credit cards. Obviously, surcharges would cause major changes in buying habits, decreasing the use of bank cards, and undermining the future of the bank card industry, and I would concur with what the man from the steelworkers said, it will be those that will be the hardest put to afford it that will continue to use it because it is a necessity to them.

So, again, you know, you lean on the people that can least afford it. The chain reaction effect of decline in bank cards operations would be the unavailability of credit for a large section of our population most needing credit.

We anticipate that the subcommittee will share our belief that use of bank cards does not penalize cash customers if the available data on the economic effect of bank cards is studied in depth.

Now, we do have some concern with the concept of the cash discount provision. But I see no reason to bandy that issue around. Our position is clearly stated in our statement.

I think I can summarize it by saying something like this: If, indeed, a cash discount does create a differential between a cash customer and a credit card customer, then there is a cost of credit to the customer. The noble intent of the truth-in-lending was to inform the customer to the greatest extent possible of what credit costs him. It seems, then, a little peculiar to hide something that could get as high as 60 percent per annum under this kind of clause.

We have no fault with cash discounts. But if it does create the difference between a credit card user and a cash discount user, then should not Congress look into whether or not the consumer who uses the credit card should be told what the true cost of that credit is?

But we will leave that at that point, except as the cash discount provision does impinge upon the State usury laws. And this is where we feel that there must be relief, and you have suggested relief.

The American Bankers Association recognizes that relief for this problem must be immediate. The type of relief is a determination that must be made by Congress.

There are at least three options available to the Congress. A decisive action would be complete repeal of S. 167, authorizing cash discounts; and I would say one would have to clarify that statement and mean that perhaps it should not be hidden; it should be brought out into the open as a charge.

The ABA urges strong consideration of the options.

A second option would be to place a suspension on the effective date of section 167 until Congress has had an opportunity to fully study the problem.

Now, I think that RESPA has come in for that kind of treatment as sort of a suspension.

It has been such a problem to everybody on both sides of the fence that people have said that this ought to be suspended.

The third option would be that contemplated by Chairman Annunzio in section 4 of the Fair Credit Billing Act amendments, which would provide a narrow Federal preemption of State law as it pertains to

cash discounts. This approach, which is precise in granting quick relief, had considerable support from the individual bankers from many States fearing impending litigation.

And I have behind me Glenn Hodges from the First National of Memphis, who has immersed himself in his sensitive problem of State usury laws. And if the subcommittee at a later date wishes to ask him questions, I am sure that he would be vocal and well-versed in this area.

The American Bankers Association has a long-standing policy of opposing Federal preemption of State law. We remain very sensitive to associating with any position which would establish any precedent for allowing State law to be preempted by Federal law.

Accordingly, we would be pleased if the Congress could arrive at a solution such as a repeal or a moratorium so that all the issues could be further studied. We don't believe that Congress should attempt to improve defective legislation with additional legislation that might have defects in it. Should the sense of Congress be that narrow, Federal preemption is the best form of relief, the ABA then requests that such a preemption be granted on a temporary basis, such as 2 could be studied and resolved rather than avoided.

We cannot understate the urgency of the need for emergency legislation as the bankers in affected States, beginning on October 28, 1975, will otherwise be subject to legal suits for violation of the State usury statutes.

That completes my statement.

[The prepared statement of Mr. Larkin follows:]

STATEMENT OF KENNETH V. LARKIN
ON BEHALF OF THE AMERICAN BANKERS ASSOCIATION

BEFORE THE
SUBCOMMITTEE ON CONSUMER AFFAIRS
OF THE
HOUSE COMMITTEE ON BANKING, CURRENCY AND HOUSING
ON THE FAIR CREDIT AMENDMENTS OF 1975

Mr. Chairman and members of the Subcommittee, I am Kenneth V. Larkin, Senior Vice President, Bank of America, San Francisco. I am also Vice Chairman of the Bank Card Division of the American Bankers Association, a trade group comprising 96% of the nation's 14,000 banks, and I am here to present the views of that organization.

We appear today to discuss the proposed amendments to the Fair Credit Billing Act. We applaud the Chairman of this Subcommittee for responding quickly to the problem sections of this Act, which have been only recently identified but will take effect on October 28th.

Such attentiveness by the Chairman and the Consumer Affairs Subcommittee to the problems experienced by consumers in their efforts to obtain credit is welcomed by consumers and lenders alike, particularly in this instance where the problem affects both groups.

We recognize that the basic thrust of the Annunzio proposal is twofold. First, the proposal precludes any interpretation of Section 167 of the Fair Credit Billing

Act as authorizing surcharges. Additionally, this amendment would specifically forbid the imposition of a surcharge on any credit card purchase. Secondly, it provides relief to those lenders in states where local law conflicts with the cash discount provisions of Section 167 of the Fair Credit Billing Act.

The ABA would like to comment on both of those important issues.

Section 2(p) clarifies the Congressional intent that the term "discount" as used in Section 167 of the Fair Credit Billing Act should not also mean a "surcharge". We are pleased that a legislative effort is being made to clarify this issue so as to end further discussion of what the actual legislative intent was meant to be, notwithstanding clear language regarding cash discounts in Section 167 of the Fair Credit Billing Act. If Congress meant to authorize the use of surcharges, the drafters of the legislation simply would have provided language to that effect. The passage of Section 2(p) of the "Fair Credit Billing Amendments of 1975" will put an end to needless debate on that issue.

The additional step taken in Section 3 to prohibit the imposition of a surcharge on a consumer using a credit card in lieu of cash payment is a necessary legislative directive. Most importantly, such a provision prevents an increase in

the cost of credit for millions of persons. Equally important, such a provision preventing surcharges helps assure the continued vitality of the bank card industry as a primary source of consumer credit.

The distinction between surcharges and discounts has been difficult for some persons to perceive. This difficulty in perception has obviously not been shared by Chairman Annunzio, as indicated by his adamant opposition to the surcharge proposal. It is, then, in support of this effort to prohibit any authorization of the imposition of surcharges that we address an important portion of these comments. In the course of trying to clarify the distinction in the two concepts, we also would like to dispel a theory which is used in support of both surcharges and discounts.

We refer to the theory that the "merchant discounts" paid by retailers are a cost of business which must be passed on through increased prices to all buyers, both cash and credit.

A 1968 Federal Reserve Board Study concluded that the merchant substituting credit cards for existing credit operations will, in most instances, find the credit card discount substantially less than the costs incurred in extending retail credit independently. The merchant accepting bank cards frees himself from the losses associated with accepting personal checks. Additionally, benefits accrue from the

elimination of the need to keep large cash reserves on premises, as well as from the elimination of borrowing necessary to maintain large accounts receivable. Many other benefits, such as large scale advertising programs identifying him with a major credit program, relieve the retailer of many promotional costs.

The Federal Reserve Board study's conclusion that the advent of credit cards has not caused an increased cost in merchandise should be carefully evaluated before providing a legislative penalty for using credit cards. Obviously, surcharges would cause major changes in buying habits dramatically decreasing the use of bank cards and undermining the future of the bank card industry. The chain reaction effect of a major decline in bank card operations would be limited availability of credit for a large segment of our population most needing credit. At best, they would be required to pay a penalty in order to buy at the time of greatest need. We anticipate that the Subcommittee will share our belief that the use of bank cards does not penalize cash customers if the available data on the economic effect of bank cards is studied in depth.

Earlier mention was made of the differences in the two concepts. Perhaps the distinction could best be ascertained by limiting our consideration to two principal aspects: psychological acceptance and economic effect.

If the effect of a surcharge is to increase prices and the effect of a discount is to decrease prices, then it is obvious that a consumer will most often reject use of any device which would increase the price of merchandise purchased.

Economically, the increase in merchandise prices in simply inflationary. The result of decreased usuage of the bank card, as well as the inflationary effect, is less credit at higher costs. The consequences of such an event would be undesirable to the Congress, the business community and most importantly, the consumer. The American Bankers Association therefore urges this Subcommittee to favorably consider the Fair Credit Billing Amendments covering surcharges as proposed by Chairman Annunzio.

We additionally submit that the consideration of the surcharge issue is incomplete unless made in conjunction with the cash discount provision in § 167 of the Fair Credit Billing Act. The bulk of the arguments set forth in this statement support not only legislation prohibiting surcharges, but also identify the problems inherent in authorization of cash discounts. We strongly urge the Congress to reconsider the cash discount provision of the Fair Credit Billing Act and to institute repeal of that provision if it determines that merchandise costs remain comparable with or without the presence of bank cards. Although some record has been made on the cash discount issue, it is our understanding that

this legislation was passed without hearings even being scheduled in the House of Representatives so that the issues could be fully discussed in that forum. It would then seem that a Congressional effort is currently appropriate to ascertain the value of a statutory provision which apparently conflicts with the intent of the disclosure provisions of the Truth-in-Lending Law. This conflict exists as a result of the legislative authorization that any discount for cash up to 5% of the purchase price does not constitute a finance charge. A 5% discount calculates as an annual percentage rate of 60%. Obviously the failure to mention an interest rate of 60% is not full disclosure of the cost of credit involved in merchandise purchased with a credit card.

We will gladly develop more fully the problems related to the cash discount provision if future hearings on that issue are scheduled by this Subcommittee. However, the existence of the cash discount provision in the Fair Credit Billing Act presents the banking community with one problem requiring immediate attention. The potential impact of this problem prompts the American Bankers Association to earnestly solicit this Subcommittee and the U.S. Congress to enact emergency legislation to bring relief to bankers in affected states.

The problem to which we refer is caused by the fact that the amount of discount offered by merchants for cash payment

would, in many states, be treated as interest or a finance charge for purposes of determining conformity of applicable credit card transactions with the usury or consumer loan rate limitation statutes of many states. In such states, the cash discount contemplated by Section 167 would bring merchants and/or credit issuers alike into serious violation of local law.

We submit for the record a categorization of states as prepared by counsel for the First National Bank of Memphis. Banks in those states are put in an absolutely untenable position by Section 167 as the law considers a cash discount as interest, a finance charge or a time-price differential.

The American Bankers Association recognizes that relief for this problem must be immediate. The type of relief is a determination that must be made by the Congress. There are at least three options available to the Congress. A decisive action would be complete repeal of § 167 authorizing cash discounts. The ABA urges strong consideration of this option.

A second option would simply be to place a suspension on the effective date of Section 167 until Congress has had an opportunity to fully study the problem.

The third option would be that contemplated by Chairman Annunzio in Section 4 of the Fair Credit Billing Act Amendments

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of 1975 which would provide a narrow Federal preemption of state law as it pertains to cash discounts. This approach, which is precise in granting quick relief, has considerable support from individual bankers fearing impending litigation.

However, the American Bankers Association has a long standing policy of opposing Federal preemption of state law. We remain very sensitive to associating with any position which would establish any precedent for allowing state law to be preempted by Federal law. Accordingly, we would be very pleased if the Congress could arrive at a solution such as a repeal or a moratorium so that all of the issues involved could be further studied. We do not believe that Congress should attempt to improve defective legislation with additional defective legislation.

Should the sense of Congress be that a narrow Federal preemption is the best form of relief, the ABA then requests that such a preemption be granted on a temporary basis (such as two years) so that the problems with cash discounts and usury statutes can be resolved rather than avoided.

We cannot understate the urgency of the need for emergency legislation as the bankers in affected states, beginning on October 28, 1975, will otherwise be subject to legal suits for violation of the state usury statutes.

Yes, Do Have A Problem	Uncertain, But Probably Yes	Probably Not
Alaska	Alabama	California
Arkansas	Arizona	Florida
Colorado	D.C.	Georgia
Connecticut	Indiana	Hawaii
Delaware	North Carolina	Idaho
Illinois	South Dakota	Iowa
Maryland		Kentucky
Massachusetts		Maine
Mississippi		Michigan
Montana		Minnesota
Nevada		Missouri
New York		Nebraska
North Dakota		New Hampshire
Pennsylvania		New Jersey
Tennessee		New Mexico
Texas		Oklahoma
Virginia		Ohio
Washington		Oregon
Wisconsin		Rhode Island
		South Carolina
		Utah
		Vermont
		West Virginia
		Wyoming

(If surcharges were promoted by Congress in the same fashion that discounts are promoted by Section 167, most of the states in the right column would move to the left.)

Mr. ANNUNZIO. Thank you very much, Mr. Larkin.

Mr. Segall? I ask unanimous consent that the entire statement of Mr. Segall be made part of the record. You can proceed in your own manner for the next 10 minutes.

STATEMENT OF MAURICE SEGALL, PRESIDENT, CARD DIVISION, AMERICAN EXPRESS

Mr. SEGALL. First of all, I speak to you neither as an attorney nor as an analyst but rather as a very practical businessman who must satisfactorily serve millions of customers who are also consumers and who also happen to be both cardholders and, in many cases, merchants of America. And I do this every day of my life.

Your purpose today is to hear testimony concerning two possible changes in the Fair Credit Billing Act: A prohibition against imposing surcharges on credit transactions and an exemption of cash discounts from State usury laws. We strongly endorse the surcharge proposal. We have reservations about the usury proposal, but we do agree that it is philosophically consistent with section 167(a) of the act. I am prepared to speak to both proposals.

First, however, let me address one major premise underlying section 167. This is necessary if our thoughts about the proposed amendments are to be fully understood. The premise—and we believe it to be wrong—is that the discount paid by a merchant to a card issuer is a direct, additional, and irrecoverable cost to the merchant. From this premise it follows that such a cost is necessarily passed along by the merchant to the consumer, resulting in higher prices. Nothing could be further from the truth.

Credit transactions have existed a lot longer than credit cards. They existed because merchants found that in the long run they provided a net gain to business. Traditionally, the merchant operated his own credit system. In order to do so successfully, he was responsible for his own credit investigations. He had to worry about collections. There were inevitably bad debt losses. He had the expense and burden of billing, accounting, and data processing. He bore all postage costs. And, his outstanding accounts receivable always cost him the going price of money.

In small business, in different times, perhaps these were not major problems to the average businessman. But times have changed. Studies show that in-house credit systems can be expensive, and a number of retailers—hotels, restaurants and others, both small and nationwide—have not surprisingly abandoned them. One study of restaurants showed that in 3 years, there was approximately a 40-percent drop in in-house accounts.

But while business may drop their own credit systems, they do not drop credit. They have replaced their credit systems with one or more card systems. They do this for two reasons: first, it is essential to offer credit; second, the card systems cost them substantially less. And they no longer have all the problems I mentioned. No more bad debts. No more collection problems.

Why is credit essential? Because the merchant increase his gross sales, his margins and his ability to compete. That's another way of saying that he is better able to offer lower prices to all consumers.

So why does he turn to third party cards? Not only to save costs. Merchants are also immediately presented with a large number of potential new customers—those individuals who carry the card he has agreed to accept. They get new business from outsiders—people who don't normally live, work, or shop in their market area. They get new business from cardholders who are willing to buy because of the availability of credit, and because of the services and promotion offered by the card issuer.

Let me say that again. Sales simply rise. There is the key. Far from being an item of increased cost, the card is a potential source of substantially reduced unit costs and increased sales. The benefits of both are capable of being passed on by the merchant in the form of lower consumer prices.

Congress did decide—out of an earnest desire to help consumers—that the Truth-in-Lending Act should create a climate in which there may be discounts for cash. Section 167 thus became law. As I understand the intent of that provision, it is fairly simple: It was designed to allow a merchant to reduce his price to reflect some "real saving" that might uniformly be identified with payment by cash.

However, as section 3 of your bill recognizes, the concept can readily be abused. Section 167 permits a difference between cash price and other prices. It is quite possible, of course, not to reduce prices at all but rather simply create a difference by penalizing those people who try to use credit cards. As you know, proposals have been made to permit precisely that type of consumer ripoff. I am sure, Mr. Chairman, that you did not have that in mind and I do not believe that Congress did either. Section 3 of your proposed bill would make that perfectly clear by prohibiting penalties in the form of surcharges.

First, let me repeat the obvious. We fail to see how allowing higher prices to be charged to card users benefits any consumer—whether or not he uses credit cards. Beyond this, I would like to explain in a little more detail that surcharge systems, in fact, do not reduce prices. By definition, they increase them. Moreover, surcharges encourage merchants to make a profit from services they do not provide; cardholders already pay card issuers for these services, and surcharges can result in cardholders being forced to pay twice. In fact, if we examined the issues carefully, it should be obvious that surcharge systems cannot be justified, and that in fact they are potentially discriminatory, deceptive, and inflationary. Let me take these points one at a time.

Surcharge systems are potentially discriminatory. They provide an easy technique for a merchant to use to penalize some of his customers for the sake of added profits, without passing any benefit on to others. The reason is simple—the credit card customer is often the type of person from whom a small extra profit can easily be extracted at no risk to the merchant—but with potentially serious effects on the card issuer. The merchant has no incentive to minimize the surcharge; it is all extra profit to him. But to the card issuer, the surcharge poses a real threat, because excessive charges can destroy the cardholder's good will which is essential to the functioning of a credit card system. This good will may be of minimal importance to one single merchant. But the actions of a small number of such merchants can have dramatic effects.

The reason why the merchant can successfully impose a discriminatory price on cardholders is clear. In economic terms, a cardholder's

demand for a particular product at a particular time may be more inelastic than a cash cutomer's. He may be out of town without cash in his pocket, or without easy access to his checking account. He may simply need to extend payment for a short period of time until cash is available. Or, as may commonly happen, he may only be able to purchase on credit, since he may not be wealthy enough to be able to pay cash for everything he needs. For any of these and other reasons, he may not be able to switch to cash to avoid the surcharge. And, if the customer comes from out of town the merchant may not care whether he attracts return business from that customer. For all these reasons, the credit card customer is a ready target for discriminatory pricing practices. The surcharge can be extracted, and those without large ready supplies of cash will the vicitims of discriminatory pricing at the expense of those who can always pay in cash.

Surcharge systems are potentially deceptive. A credit card customer, whether or not he has cash in his pocket, can be attracted into a place and the low price in the window, or simply by his knowledge of competitive prices. Once he enters, he will discover that he has been mislead because the price for him is more. If the cardholder is "switched" to cash, the merchant has succeeded in trading on the card issuer's good will for free.

Surcharge systems are potentially inflationary. Merchants are not going to lower their general prices levels so that they can impose surcharges. Retail prices are set in far more complicated fashion than that. In any event, the surcharge will simply become an added profit item for merchants and an additional loss to consumers.

We are told, surcharges are still proconsumer, because they allow a merchant to impose the cost of accepting credit cards on those who get the benefit. Thus, the merchant's pricing system can supposedly be made more fair by using surcharges, even if there are obvious risks of unfair discrimination, deception, and higher overall prices. In all candor, I must say that this argument totally misses the point. First, it erroneously assumes that additional costs can be associated with credit card acceptance by merchants. Although merchants do, of course, ordinarily pay a discount to card issuers to pay for the variety of services offered to merchants in connection with card plans, this discount cannot automatically be identified as a cost which should be passed on to card users.

I will summarize by saying this, I would be more than pleased to answer any questions in connection with how merchants, restaurant people, hotel people all over the world feel about paying a discount for the privilege of accepting, for example, the American Express Card.

In the final analysis, they don't give away anything for nothing.

Mr. ANNUNZIO. Mr. Dillon? I ask unanimous consent that his entire statement be inserted in the record.

STATEMENT OF JOHN DILLON, EXECUTIVE VICE PRESIDENT, NATIONAL BANKAMERICARD

Mr. DILLON. Thank you, Mr. Chairman. In the interest of time, I would like to simply state that the first roughly two-thirds of my oral

presentation has to do with being absolutely supportive of the stand taken by the chairman and by some of my colleagues who preceded me in prohibiting the prohibition of the surcharge. So rather than to reenter a lot of same arguments for that prohibition I will just refer to the record and go on into my statement.

National BankAmericard Inc. and its membership of more than 6,000 commercial and mutual savings bank, with over 15,000 offices, operate a bank card system throughout the United States using the service marks "BankAmericard" and "Blue, White and Gold Bands" design. The system also operates internationally through foreign banks located in various parts of the world. As of the end of 1974, the BankAmericard system in the United States had approximately 29 million cardholders using nearly 18 million accounts with aggregate outstanding balances of $3.85 billion. In the United States the BankAmericard is accepted by over 700,000 merchants at over 1 million merchant outlets.

Last year, Congress passed and the President signed into law the Fair Credit Billing amendments to the Truth-in-Lending Act. Section 167 bars issuers of credit cards from entering into agreements with merchants which prohibit the merchant from offering a discount to consumers to induce them to pay by cash, check or similar means, rather than a credit card; and declares that any such discount will not constitute a finance charge for purposes of the basic disclosure requirements of the Truth-in-Lending Act so long as the discount does not exceed 5 percent. NBI noted its concerns with these provisions in statements filed with the Subcommittee on Consumer Affairs of the Senate Committee on Banking, Housing and Urban Affairs at the time the bill was under consideration, and later with the Federal Reserve Board in response to proposed regulations to implement the act. We believe then, as we do now, that by focusing upon but one of the many costs that are incurred by merchants as an incident to their engaging in business and by focusing upon but one segment of the consumer population for adverse price differentials; by failing to take into account any of the benefits that accrue to merchants who honor credit cards; and by failing to give effect to the spirit of the Truth-in-Lending Act by isolating this one form of finance charge for exemption from disclosure, these provisions unfairly discriminate against credit card issuers and the vast number of consumers who use such cards.

Consideration is now being given to the enactment of H.R. 10209. This bill would, among other things, limit the scope of section 167 to reductions from the tag or posted price at which merchants otherwise offer goods and services, and would prohibit the assessment by merchants of surcharges in connection with credit card transactions. NBI strongly supports those provisions of the bill which would prohibit the imposition of surcharges upon consumers who desire to pay for goods and services by the use of a credit card rather than by cash or check.

In addition, we submit that merchants do not have the capability of determining the real cost of participation in a credit card program, which determination must necessarily take into consideration, not only the discount payable by the merchant upon a credit card trans-

action, but also the costs attributable to payment mediums other than credit cards, and the advantages which accrue to merchants by their adoption of credit card plans, such as higher sales volume. We submit that the general assumption of proponents of surcharges that there are no costs incident to the acceptance of cash or checks is fallacious.

As a result, we believe it naive to assume that merchants would impose surcharges solely to recover aditional costs incurred as a result of their participation in a credit card plan and that the cash prices of merchants would be reduced accordingly. Rather, we believe that the surcharge is more likely to be used by the merchant for the purpose of obtaining aditional funds from those consumers who use credit rather than cash. We fail to see how the consumer will benefit from this practice.

We are also concerned about the inherent inconsistency with the Truth-in-Lending Act of allowing merchants to impose surcharges without a concurrent disclosure obligation. The Truth-in-Lending Act was enacted because the Congres believed that meaningful disclosure of credit terms would enable the consumer to more readily compare the various credit terms available and thereby avoid the uninformed use of credit. Under the provisions of that act, a merchant is required to disclose to the consumer the amount of any surcharge which is assessed in connection with a credit card transaction including the annual percentage rate equivalent thereof. In this connection, a surcharge of 5 percent would amount to an annualized finance charge rate of 60 percent, a rate which is substantially greater than the 18 percent rate generally assessed by banks in connection with their credit card programs. We do not believe there exists any justification whatsoever for enabling merchants to offer consumers credit alternatives, with respect to which the applicable rates of finance charge may differ by as much as 60 percent, without requiring the disclosure to consumers of that fact.

Although supporting those provisions relating to surcharges. NBI is unable to support that section of the bill which would preempt both credit card issuers and merchants from State laws regulating the maximum rate of finance charges, where discounts offered pursuant to section 167 may fall within the scope of such laws. Traditionally, the establishment of rate ceilings in credit transactions has been a matter of State law and we believe it should remain so. We reject the assumption the the entry of Congress into the field of credit rate regulation is warranted. If States wish to encourage merchant discounts by exempting such transactions from their usury laws, that should be left to them.

Nevertheless, as a result of the bar placed upon the power of banks which participate in credit card programs to prohibit merchants from granting discounts, Congress has exposed banks in many States to substantial contingent liabilities arising from the possible violation of those States' usury laws. Banks no longer are able to control the offering by merchants of discounts, the amounts thereof, their availability to all consumers, or the proper disclosure by merchants of that availability. Since the exposure of banks to liability under State law in these instances results from the enactment by Congress of section 167, we believe it incumbent upon Congress to amend that section to pro-

vide a limited exemption for card issuers from the application of State usury laws. Such amendment should not, however, exclude from the application of State usury laws, sellers who offer such discounts. Only in this manner can the States retain their authority over the establishment of finance charge rates, as has historically been their role, with the Federal Government's incursion in this area being limited to providing an exception for those credit card issuers who do not extend the credit with respect to which their exposure under State law arises, and whose ability to protect themselves by contract has been precluded by Federal legislation.

Thank you very much, Mr. Chairman.

Mr. ANNUNZIO. Thank you, Mr. Dillon.

Now, we'll hear from Mr. Maw. I ask unanimous consent that your entire statement be made part of the record, and you may proceed in your own manner, for 10 minutes.

STATEMENT OF MICHAEL B. MAW, GENERAL COUNSEL, INTERBANK CARD ASSOCIATION

Mr. MAW. Mr. Chairman, members of the subcommittee, I would like to thank you for the opportunity to appear before you this morning in order to discuss the very important issue of surcharges.

I am Michael B. Maw, secretary and counsel of Interbank Card Association. The over 7,000 banks which are members and affiliates of Interbank offer the Master Charge card to more than 34 million consumers in the United States alone, and offer acceptance of the card to over 800,000 U.S. merchants which have over 1,200,000 outlets. Our member banks are offering a service which has been enthusiastically embraced by consumers and merchants, as witnessed by the rapid expansion of Master Charge since the founding of Interbank in November 1966.

Now, Mr. Chairman, I'm leaving my written comments in the record. I would like to say that Interbank supports H.R. 10209. We support your proposal to outlaw surcharges, and we support your proposal for relief from State laws. We'll take it as it is. We might have written it a little differently if we had been the authors, but we'll take what we've got.

This morning I would like to highlight a few parts of my formal statement. Such as our survey. It's the first consumer survey anybody has done to consumer attitudes to surcharges and discounts. Briefly stating, we found approximately 70 percent of present card users, the affluent card users, would switch from credit card use to using cash if they were confronted by a surcharge. As your comments were clear in your introduction of the bill, nobody likes a surcharge, not even a politician. No one wants to vote in favor of a surcharge. It's best to be on the side of discounts.

We also have prepared an analysis. As far as we're aware, no one has put down in balance sheet form showing you what the costs are. We think these facts about discounts may surprise you. They are in there, and we're not fighting the discount today. But our facts clearly show that it is the affluent who benefit from surcharge. And it is particularly harmful to the vast majority of consumers; and also, as you can guess, it's not helpful to the card issuers as an industry.

We disagree with the suggestion that a two-tier price limit would occur. There has never been a two-tier price limit in history anywhere at any time. The only example ever raised had some discussion to do with a time price doctrine and did not involve third-party credit. The suggestion was made first by Professor Jaffe of Princeton, and was attacked in the plaintiff's case in Philadelphia. I have not read the entire testimony, but I do have the brief of the defendants, if the committee wants to see it, where the underlying theories were pretty well torn to pieces, or at least that is what the defendant said.

We would also like to point out that there is a very significant cost to using cash. Possibly it costs more to use cash than it costs to use a credit card. These studies are very preliminary. No one has ever done yet the preliminary study. I understand my colleagues from National BankAmericard are now conducting such a study. The cost of bad checks in the United States today is over a billion dollars which is far more than the cost of all discounts paid on bank cards; far more.

A couple of other comments. We do make one recommendation yet to this bill. Consumers right now, we feel are most likely to encounter an offer of discount from a less than reputable merchant. We would suggest that the committee consider the desirability of providing some warning to the consumers when offered a discount, that the consumer is likely to lose the benefits of section 170 of the Truth-in-Lending Act which permit many to raise certain claims and defenses in the case of the dispute with a merchant.

We believe this would be helpful to consumers. We disagree with the Consumers Union suggesting that we should pay for the cost of notifying merchants about various things. We would be glad to notify merchants if they would like to put up the money, and we would be glad to notify merchants if the Congress would like to put up the money. But we don't want to pay it out of our own pockets.

The gentleman from Arnco was complaining about the cost of credit cards. I think it would be an excellent case study of the profitability of credit cards.

Thank you very much, Mr. Chairman.

Mr. ANNUNZIO. Thank you very much.

Now, Mr. Gewirtz and Mr. Roll, will you please take seats in the front panel?

I am going to allow all of the members to ask questions. But I am going to make a statement to Mr. Gewirtz.

Although you have taken an opposite position on this surcharge issue, I want you to know that I admire and respect Consumers Union for its important and successful work for consumers.

And although we have a difference of opinion here today, I hope you recall that I strongly supported the Consumers Union in its efforts to make the Federal Reserve Board disclose interest rates.

Indeed, on this issue I commend the Consumers Union for its planned efforts to launch a major campaign to persuade merchants to offer cash discounts.

So I find myself today in disagreement, honest differences. I listened attentively to your remarks, your good statement, but you haven't persuaded me and I just want to lay the cards on the table.

Mr. GEWIRTZ. I appreciate that; and while we are disappointed that in this case we don't agree, we appreciate all the work that you have

done for consumers and we hope that you will and expect that you will continue to do that.

Mr. ANNUNZIO. I hope after we mark up this legislation and we find the benefits under this legislation without the surcharge, that the Consumers Union will also reflect that attitude. I am not going to take too much time.

But Mr. Wylie and I were both members of the conference committee when this section was adopted. I can remember the little room we sat in on the Senate side, and the hours that we spent and we worked hard to get this discount provision.

And if I am wrong, I want Mr. Wylie to correct me—never once was the question of surcharge raised because had it been raised or had it been in the record or anywhere, I would have jumped through the ceiling because I always am a very practical man.

I also represented a district that had the world's largest retail center and I know what goes on. So that in this particular situation really there are no winners because when you go into a department store, a shirt is advertised for $10, you get a cash discount so it comes to $9.50, you add the 5 percent and it comes out to $10.50; the shirt is never sold for 10 bucks to begin with under the circumstances.

But then like Mr. Segall and Mr. Larkin brought out and Mr. Dillon, you see this 1½ becomes 8 percent and then the additional 5 percent and it goes on and on, and you wind up with 40, 50, or 60 percent interest rates.

But I do want to stick to the subject matter. You know I went to the Rules Committee the other day, and here we are discussing truth-in-leasing and some Member of Congress brings up RESPA, which took up all the conversation.

I mean, you have got to stick to the issue. My purpose here in advocating truth-in-leasing or truth-in-lending and fighting for the garnishment section in this truth-in-lending bill was that I did not want to set prices.

I just wanted the people to know how much they were paying, what the contract says, the fine print, and we must not lose sight of that, that we are here today for the purposes of eliminating the surcharge and that is all my bill does.

We don't touch the other sections, the discount section in the bill. I have no questions.

I am just grateful that all of you are here. And from time to time we find ourselves in disagreement and many times we find ourselves in agreement.

I know Mr. Dillon has been here before, and I hope that when we get through today, that in the middle of the road some witnesses don't have a change of heart.

I have had witnesses appear before me who would endorse something and then after it came out of the full committee, they were very displeased and they take the legislation on the floor of the House and you don't get anywhere.

We try to do the best we can, and we do have a wonderful relationship with the Republican members and the majority members. We are trying to do a job for the consumers the best we know how.

Mr. WYLIE. I will confirm that I was on that conference committee with you and what we attempted to do and we wrote this Truth-in-

Lending bill into another omnibus bill, but the question arose—what if somebody comes in and he says, "I would like to buy this product for $100," and he says, "What if I pay $40 with cash?"

And the person selling the item says, "You can have it for $96 if you pay cash."

Now, that is what we were trying to exclude that from the Truth-in-Lending law and why should it be in there in the first place, because it is not an additional charge, and to say that the word "surcharge" and the word "discount" are synonymous, makes us all look like fools in my judgment.

I went to law school, too, a discount says in Black's law dictionary that it is something less. It is a deduction from a gross sum.

A surcharge is an exaction or an impost or something beyond an exact sum.

Now, I don't know why we have to be here. And when we talk about a two-tier pricing system, that complicates the problem all over again.

It would be a three-tier pricing system really. There is $100 for the posted price. There is $96 for a discount if he wants to pay cash, or there is $104 if he uses the credit card or uses some sort of credit.

So that is really three-tier pricing in my judgment. But it seems to me, and I will ask anyone of the panel to comment, that really all we need to do—and as I say, I cannot understand how we ever got into this question of whether a discount is a surcharge. It is just beyond my comprehension, really.

But in this bill, so that there will be no apprehension in anybody's mind, all we need to do is define "discount." It says "from the regular price." Maybe we ought to say "regular advertised price," or "regular posted price," so that the price won't be a figment of somebody's imagination and so everybody will know what the price is and use the same word down here under "surcharge."

Then I will ask all of you why on lines 21 don't we strike out the words "not in excess of 5 percent." I don't know why that was added in the first place and it should say "not withstanding any other provisions of this title, any discount offered shall not be considered a finance charge."

That was just something that Senator Proxmire pulled out of the air during the conference, I guess. And we were trying to get the bill out and that sort of thing.

So that should be included. And then just one other thing. Does anybody have any comment on striking that language out of line 21?

Mr. GEWIRTZ. I, too, don't know where the 5 percent figure came from.

Mr. WYLIE. It doesn't mean anything. What makes a difference if he advertises it for $100 and the man says, "I would like to pay cash for it," if he sells it for $90 or $95?

Mr. MAW. I like your suggestion and I invite your attention to section 127 in the Truth-in-Lending Act where there is an exemption for calculating APR's when minimum amounts are involved.

If our purpose is disclosure for the consumer there is no reason any more for suggesting that finance charges or discounts or anything else under certain amounts cannot be calculated.

Your discount should not be a finance charge. I think you should look at that section.

Mr. WYLIE. What we are really talking about in section 20 is whether we are going to preempt state laws with respect to usury.

I think that all we need to do—somebody had some language here, but isn't all we need to do is to put the words "and usury" after the word "information" and usury laws?

Mr. GEWIRTZ. The language that is in the Annunzio proposal is drawn from section III of the Truth-in-Lending Act which establishes the general rule that you don't preempt; and in that verbiage that is word for word. And so I think it would be best to keep it that way.

Mr. WYLIE. Mr. Larkin, please explan how the offering of a cash discount will violate a State usury law.

Mr. LARKIN. Well, the construction can be made that there is a differential between a cash price and a credit price and if the card issuer is charging a certain percent, a certain rate of interest and then an additional amount is deemed by State law to be the result of the differential whether it is 1, 2, or 3 percent, if the card issuing entity is charging at the legal usury limit, then adding that 1 or 2 or 3 or 4 percent, that would represent the equivalent, the difference between the cash and the credit price, they would add that to the, say 18 percent and you would be up to 22 percent and you would be over the State law. It would be a combination of two rates.

Mr. WYLIE. I appreciate what you are saying and I know it is your business and you know it and you are a very intelligent man, but frankly that sounds like double talk to me.

If a usury law of a State is 8 percent above the stated price and there is a discount to the cash customer below a stated price which must be at not more than the 8 percent level to begin with, how could that violate the State usury law?

Mr. LARKIN. You get into a case for the lawyer where the argument would be made that this difference between cash and credit price represents an interest differential.

You make a very pragmatic viewpoint that this is a discount and has nothing to do with inteerst.

We fear, in many States, that there are those lawyers that will construe that it is a differential, a finance charge that can be expressed in terms of percent——

Mrs. FENWICK. The problem is that the State has decided to make it a legal matter that any discount you get for paying cash is evidence of a credit charge.

Now, if they had not conceived of that, it would not come under usury at all.

Suppose the merchant wants to give a discount for cash because he likes cash.

I am really shocked by one phrase here where we have "The bar placed upon the power of banks to prohibit merchants from granting discounts."

How did they get that power?

What the consumer needs are discounts.

I can understand what you are saying and how usury could be dragged into it because the States have chosen to do so. But the point is it was ridiculous to do it.

We have before us a law which amazingly considers any cash discount as a form of credit.

Mr. WYLIE. All we have to do is say this preempts the State usury law and that is what we are going to do.

Mr. Hodges, what happens if a merchant wants to offer a discount of more than 5 percent?

Mr. HODGES. I think that is the void in this whole thing.

In section 167, as it now reads, and in your proposal, the banks are left hanging out. Your proposal does not cover if he does offer one in excess of that and yet we are precluded by 167(a) from prohibiting him from offering a discount in excess of that.

Mr. WYLIE. So we ought to strike out that language.

Mr. HODGES. I think those exact words should be inserted in (a) after the word "discount" so that card issuers may have a chance to prohibit their merchants from offering discounts in excess of 5 percent.

Mrs. FENWICK. Why? Suppose they want to offer 10 percent?

Mr. HODGES. Either that or you will have to change (b) or (c) to exempt us all the way because we are still left hanging out under State law that would say that that discount would be usury.

Mr. WYLIE. OK. We are going to strike out the words "not in excess of 5 percent" and then insert the language "and usury laws."

Mr. HODGES. But may I suggest that the way (c) now reads, it refers to 167(b). It says any discount offered under section 167(b).

Mr. WYLIE. Take "5 percent" out of both places.

Mr. ANNUNZIO. Those are technical changes and when you take it out of one, it automatically comes out of the other.

Mr. LARKIN. Mrs. Fenwick, I think, has been misinformed and I think it was in this statement of Consumers Union where it says "Historically, however, the major credit card issuers have prohibited merchants from instituting any system of price discounts for cash payment."

Mrs. FENWICK. I was talking about the statement of John Dillon on page 5.

"Nevertheless, as a result of the bar placed upon the power of banks which participate in credit card programs to prohibit them from granting discounts."

Mr. LARKIN. OK. But the point is that we have no such agreements in our contracts. We do about 10 percent of the Nation's business. Our competitors in California do 10 percent. So there is one segment that does not have any such prohibition.

Mrs. FENICK. If I was misled, then it was by Mr. Dillon in his testimony on page 5. [Laughter.]

Mr. WYLIE. I would like to just pose a question. I think that somehow we need either to say something in this bill or give some instructions to the Federal Reserve Board which is going to promulgate the rules as to how the merchant should advertise his stated price or how he should advertise the price of the item so that the customer will know that he is getting a discount when he goes to pay cash.

Would you like to comment on that?

Mr. GEWIRTZ. I don't have in front of me the rules and regulations that already have been promulgated, but the Federal Reserve Board was quite imaginative, I think, and very careful in proposing already—in already providing that if you have an advertisement, you must provide it and you must notify it. I think that is an essential protection because no one wants to have this system used to mislead consumers. I can furnish that to your office afterwards.

Mr. WYLIE. I think the main thing we need to do is be sure there is a stated proposed price. Once you start from that position, then your don't have any problem. And you say that is the regulations which they are proposing?

Mr. GEWIRTZ. Yes.

Mr. MAW. You might consider the desirability of including in the regulations a warning to the consumer that acceptance of the discount means he forfeits the rights under section 170 of the act and any rights he may have under any prohibition under State law. That is the tradeoff for the discount if the consumer loses a right to protest later if the goods are shoddy or defective. Under the Truth-in-Lending Act, now, if goods are shoddy or defective, you can complain later on. In other words, you have some time to look things over. There are some restrictions on that, but that is a generalization. If you pay cash, your cash is gone out of the pocket; and if things haven't worked out correctly, it is too late. You have to sue the merchant and that is the hard way of doing it.

Mr. WYLIE. I understand what you are saying, but this goes back to the old saying, "Let the buyer beware." We have gone the additional step where a person uses a credit card now and we have made the credit card holder a holder in due course not only against the merchant, but against the credit card company. I mean we have repealed the idea of the holder in due course so he can go back two steps.

Mr. MAW. Obviously the merchant who is engaging in less than ethical practices will do everything he can to encourage people to pay cash so he can fly that knife rather than accepting credit cards which may have some resource.

Mr. WYLIE. I think there is a little difference between buying something on credit and paying cash for it. And I don't know that we should say that the person who buys something and pays for it by cash necessarily has to take a defective item without a warning or anything like this. But I think there is a little different standard or test there. Should we put that in the report, then, and suggest to the Federal Reserve Board that they make some statement along that line?

Mr. MAW. That could be shown in the report.

Mr. WYLIE. We want the report to show that if a person buys something for cash and he gets a discount, that that doesn't mean he gives up all his rights to go back again, that merchant, for a defective item or something like that.

Mr. GEWIRTZ. I think what Mr. Maw has suggested, if I understand him, and this is an old argument that they have been making, and is really more detailed than that. They want to have this committee require every store to give out a piece of paper to a cash customer saying, "Your 170 rights that you would have if you paid by credit card, you don't have when you are paying by cash. I think that is what you were suggesting, weren't you, Mr. Maw?

Mr. MAW. We are asking that that merchant has to post a sign that says, "I give discounts of 5 percent for all credit card transactions." We are asking for a little P.S. on the bottom: "By the way, if you happen to accept my discount, you lose any rights you have under Federal or State laws as a holder." But you are enticing the consumer into something and he ought to be fairly warned that if he does it, he is going to lose something. It is a trade-off. Let him make the decision which way he wants to go.

Mr. SEGALL. I wonder if I could speak to the question of eliminating the 5 percent and in effect say that a retailer or restaurant may have the option of saying that if he pays cash, we will take 15 or 20 percent off the price. My objection to that particular issue is that it identifies a presumed discount cost with the use of a piece of plastic. I get very uptight about that because I remember, for example, I used to put up very large discount stores and very large parking lots, very expensive parking lots, and I used to put them in highly dense areas. I used to have many customers who used to walk to my stores. Should I tell those customers who walk to my store that I will give them a 10 or 15 percent discount versus the person who drove and parked their car and used my very expensive well-lit, well-maintained parking lot? What about those people who don't use my bathrooms? Should I charge them?

Now that may sound facetious, but it isn't. So that is the reason why, to be fair about it, I don't even accept the idea that there is a cost in excess of cash.

But, granted, you have passed that legislation. But I think it is unfair to identify and allow a merchant to presume a cost that is totally out of proportion even if it were there.

Mr. WYLIE. In connection with that, isn't there some administrative cost for the paperwork necessary to use a credit card?

Mr. SEGALL. There most certainly is. I would hate to tell you what I lose in bad checks. Mrs. Fenwick expressed a surprise when that bill dollar came up.

Mr. WYLIE. Are most of your credit card transactions paid for by check?

Mr. SEGALL. No.

Mr. WYLIE. They go into the store and pay cash for it.

Mr. SEGALL. Let me explain what happens.

Mr. WYLIE. I get a bill at the end of the month, and I write a check for it. I send the issuer that check.

Mr. SEGALL. I used to be with the J. C. Penney Co., and I used to run some very large stores. And one of my very major costs was bad checks that I would get from a customer at point of sale, at point of sale. And by the way, that is only one item. I don't want to get hung up on bad checks. That is only one item.

Mr. MAW. May I respond to that, please. We are talking about a credit card customer. What does a credit card customer cost the merchant? And that you are saying is this cash discount, plus some processing costs.

The other question is: What does the customer have to pay? Is there an equivalent for the cash customer? What my colleague is saying is, that there is an identifiable cost to processing a cash customer, which is analogous to the discount. The question has been raised, although the economic study hasn't been done, but the suggestion is that it may cost the merchant more to service a cash customer than it costs the merchant to service a credit customer. A study is being done, sir, and I call your attention to bad checks, check verification, versus counterfeit, theft, embezzlement.

Mr. GEWIRTZ. I am somewhat outnumbered here, so I may have to talk up more frankly than I should. But I want to get my view on this

issue in. It may be that some stores don't want to do this, only want to give a 2 or 3 percent discount or no discount at all. It may be that Mr. Segall is right, that for some stores it makes no sense. The point of all this is that if a store wants to give this cash savings to customers, they should be allowed to do it. And what the credit card companies have been trying to do is to prevent the store from doing it.

So all we are talking about is freeing things up without artificial ceilings or artificial limits on what a discount can be.

Let the store decide how much it means to him and how much less he wants to charge the cash customer.

Mr. ANNUNZIO. Mr. Wylie, your time is up.

Mr. Wylie, Thank you very much.

Mr. ANNUNZIO. Mrs. Fenwick?

Mrs. FENWICK. There are four ways of doing it now, I think. First, there is cash; second, there is payment by check; third, the charge account and the charge account has two types: with one account you pay within 30 days perhaps with a discount for 10-day payment, with the other you pay a certain interest on the charge after a certain date. And the fourth one is the credit card. I think credit cards are great. I have nothing against credit card companies or banks or anybody that gives a customer a fair shake. I have no credit cards, except telephone credit cards, so I am not used to dealing with them; but I think they are terrific.

However, I do feel that when a store wants to say "No checks—cash or credit card," they have a perfect right to do so. There are several points that have struck me. Here we have discussed maintaining the vitality of the credit card industry. I am not against it, but this is not our particular job in this bill. I think it is wonderful to have vital industries of all kinds, paying taxes, but it is not our purpose to address that issue here.

The real problem before us is that the costs of any transaction are going to be paid by the customer—whether it is credit cards, or the problem of checks, or charge accounts that the collection agencies have to get into—it is the customer in the long run that stands for it all. The only thing we are trying to do here is to make it equitable.

I never approved of the Fair Trade Act. I was consumer director in New Jersey. We had fair trade there; and right across the river you could buy a radio for less than you could in New Jersey. This is the problem we have gotten into in this country. We like the laws giving discounts, some form of evidence of what it costs to have credit. The real point is freedom of choice—for the consumer and for the company. One company may not like checks, if it prefers cash, that is its privilege.

In short, I think we ought to free up the whole system, allowing those stores that want to give discounts to give discounts, allowing people who like credit cards to use their credit cards.

I certainly would be against a surcharge. I am sorry. I can't go along with that. The professors who advocate these things don't understand the psychological impact of a surcharge.

Mr. ANNUNZIO. Mrs. Fenwick, I hate doing this, but I must tell you that the parliamentary situation I find myself in happens to a chairman. There are 10 more minutes left on the floor of the House and then

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we won't be able to meet until Tuesday. I have a quorum now to mark up this bill. Would you be willing to do that?

Mrs. FENWICK. Absolutely.

[Discussion off the record.]

Mr. ANNUNZIO. Mrs. Fenwick, you can proceed with your questioning now.

Mr. MAW. Mr. Chairman, I would like to just introduce a side comment.

There are a couple other problems perhaps not as serious as the surcharge issue and we hope you will hold hearings on other subjects.

In particular we would like to invite your attention to the description of transaction provisions which are very much a problem because all the leadtime is gone. It is going to take us a long time. And if there should be change and we believe there should be, we would like you to invite our attention to that for action as soon as possible.

Also, we have a severe problem with creditors and consumers because when we ask for advice from the Federal Reserve on how to obey the law, nobody tells us how to obey the law with any force that stands up in court.

It was introduced in the Senate last week regarding 1927, to give the same powers to the Federal Reserve staff or members thereof——

Mr. ANNUNZIO. If it is not asking to much, I want you to continue to talk but I would appreciate, from any one of the witnesses, at any time, your personal comments on this entire legislation wherever improvements can be made.

Mrs. FENWICK. Let me comment on that.

I couldn't agree with you more, and what we have been trying to do in some of the Banking Committee hearings is to try to arrange it so that when a Federal agency is asked for advice and gives out an advisory opinion and that advice is followed in good faith, the person who asks for advice will be protected from legal action. I introduced a bill in April—H.R. 6406—that would offer this protection when firms complied in good faith with agency advice. We need this because we have chaos now.

We have small businesses asking for information from the Federal Trade Commission on these regulations. Those small businesses can't afford corporation counsel and they go to the Commission and say: "Is this a proper contract?" The Agency says "Yes" and then there is a disclaimer at the bottom saying "this won't cover you under certain circumstances."

I think this ought to be an established part of Government practice since we have become so tremendously——

Mrs. SPELLMAN. I don't know what it would require to do that, but whatever is required, let's do it.

Mr. MAW. What it is based on is under the National Defense Act of 1943 all it says is that you name certain people and you say they have the authority to speak on behalf of, and this is really it.

Mrs. SPELLMAN. Way back in the 1930's when I worked with the Fair Labor Standards Act, the attorneys would respond to the people when they inquired whether they were covered by Fair Labor assistance by citing section 238B4, paragraph 6, sentence 3, which really tells them nothing.

I got so tired of having those letters come across my desk that I told the Administrator I was going to start taking care of that kind of correspondence and would tell people whether they were or were not covered in language they could understand.

I also said to the Administrator that we needed one more step. After we told the people where they stood and when they followed the directives we gave them, and if they were not in error, we would not prosecute them. We would defend them and we stated that.

The Administrator left and went out to New York. I understand chaos broke out because the next Administrator did not follow the same policy.

And so I think that this is terribly important and we will do that.

Mr. ANNUNZIO. There is a Mr. Hodges in the audience that wants to make a statement.

Very well. Proceed.

Mr. HODGES. I wanted to mention before the committee takes the 5 percent out of the section, that we have heard a lot of talk about the purpose of just letting the consumer do what he wants to but it is 167(a) that actually frees the merchant to offer discounts and (b) merely permits him to offer discounts up to 5 percent without having to disclose that under the Truth-in-Lending Act.

And if that were taken out, although it might make my job as a banker easier, I think that it would be permitting merchants to extract enormous financial charges without disclosing the fact to the consumer.

Mrs. FENWICK. But don't you think that when there is a ticket price, or advertised price, the merchant certainly isn't going to want to advertise a high price in order to catch people with credit cards. He is going to put his advertised price as low as he can competitively. I don't think that is the danger.

Mr. WYLIE. What he is talking about is whether he is properly disclosing under the truth-in-lending law if for example it is in excess of 10 percent over.

But what we propose to do here is to define the word "discount." And the confusion arose because discount and surcharge were being used interchangeably.

We are not talking about any additional cost.

But if we say with respect to any sales transaction any discount offered by the seller for the purpose doesn't have to be disclosed, I don't see how that could be more clear.

Mrs. FENWICK. With the system we have now, there are stores that have charge accounts and give you a 7-percent discount for paying the day you buy it if you pay with cash.

I don't know whether they have credit cards or not because I have never tried to use one there.

Mr. HODGES. But today under this bill as it now reads they would have to disclose that 7 percent to the consumer is a finance charge.

Mrs. FENWICK. But that is because the State laws have said that this is for the cost of credit. You see, that is—the State laws have messed it up.

Mr. WYLIE. I know what you're talking about. But if we take the bill here which sees a reduction from the regular price. Discount means

a reduction from the regular price. Now I don't think there would be any confusion on that score. And then down on line 20 of page 2 if we add the language after the word quote "they" unquote "that charge or on the charge for credit and the usury laws of any State or the laws of any State relation to disclosure of 4." Won't that take care of your problem?

Mr. MAW. Excuse me. The legal point is that the act itself does not define what is a "price." The regulations do. The regulations talk in terms of any charge in addition to the cash price. Now, we have been very careful——

Mr. WYLIE. But you use the word "addition."

Mr. MAW. In other words the purpose of the Truth-in-Lending Act was to get around every device possible for the merchant to perpetrate any fraud on the consumer. So it used the term "cash prices." Now, we have been urging that you don't use the term "cash prices" here because that is a contradiction in terms. We support your suggestion, Mr. Wylie, to use the term "posed prices" which, we understand, is not the same as "cash price" because that would be an impossibility because you can't have a discount from cash for a cash price.

Mr. GEWRITZ. I don't think this proposal of yours implicates large questions in the Truth-in-Lending Act but it's limited to this kind of situation where a discount to cash payment—all you're suggesting is: Why should it be limited to 5 percent?

Mr. WYLIE. Well, we'll explain it in the report at least.

Mr. MAW. The difficulty we're running into is because of the problems which are now in the act and we're trying to get around a problem that is in the act, the Truth-in-Lending Act, any addition including a discount in order to avoid certain pricing practices.

Mr. WYLIE. Then, you're saying we ought to make an amendment to the Truth-in-Lending Act which would make it——

Mr. MAW. No. What you have written down accomplishes what you have said you wanted to do. The difficulty is that the judges sitting on the case won't go by the posed price but will make their determination on the basis of the price which the cash commerce could get in order to define what is usury. But you have solved that problem in your own way here. I think you have solved the problem. And so I think it's enough for our purpose and what we're facing next October 28 if we can find another committee person.

Mr. ROLL. I think the legislation is going to be talked about this afternoon in a way that Atlantic Richfield has taken opposition to. But just on a narrow point I think you might want to get some considerations to the concept of "regular pricing" which appears in your bill 10209. I find it difficult to know what a regular price is. And I think, I just think that you ought to be giving some consideration to that if you're going to be marking up, recommending the passage of this bill. I had some experiences with this in the Federal Trade Commission with their deceptive pricing guides. And when you get into trying to write regulations, you get into a horrible mess and a lot of merchants were unhappy about the way those guidelines were written. I just throw that out for your consideration.

Mrs. SPELLMAN. I started to say very naively that the "regular price" would be the ticketed price and then it occurred to me that when I went

in to look at light fixtures there were tickets on them. I found that if I had an electrician buy it, it would be half price. But if I didn't have an electrician, it would cost full price. So the cost is really half the ticketed price.

Mr. LARKIN. I would like to say something. I think you are beating a dead horse. If all of you think, in your own experience, about where you make money buying it isn't paying 2 percent discount for cash, 3 percent discount for cash. It is accepting Joe Garragiola's offer to get a new Plymouth and Plymouth will send you $300. It is an offer to buy a $185 suit in the June clearance sale at $105.

Those are the substantial purchases that consumers make, not this quibbling over 2 and 3 percent.

I think if you just remember your own experience day-by-day when you make a bargain purchase, it is in that kind of area where you are dealing with something fairly substantial.

I don't think the ordinary consumer is ready to quibble on every sale for 2 or 3 percent every time he buys a bottle of aspirin or a can of Campbell's soup.

I think that ought to be kept in perspective, of just where the marketing effort on sales and bargains takes place. It isn't in this 2 and 3 percent area that you are talking about.

Mr. SEGALL. I could probably wax lyrical on that subject forever. I think there are some rather ironic erroneous assumptions surrounding the conversation. In the first place, the acceptance of a credit card, I don't care which it is, by a merchant is deemed by that merchant to be a good thing. It is as simple as that. Nobody twists his arm. Nobody forces him. He is not required to by law. He does it for the simple reason that he puts in nice washrooms and nice stores and provides nice waiter service, provides a nice refund desk, or whatever he does to be a merchant; and that is just one more piece of his business.

I have personally negotiated our discount rate arrangement with the leaders of countless companies, I might add, in Canada, the United States, and all over the world, and some very hard-headed people who watch every penny, and I am not going to give them 3 or 4 percent just because it is the American Express Co.

But they do it and they do it nicely and they welcome it because we generate benefits. And the consumer gets something out of it. The consumer has already paid the American Express Co., x dollars for that card and they expect something out of it and so does the merchant. It is a two-way street.

The consumer benefits, and I might add that the 7 million American Express card members are consumers. There is a big public out there. They are the consumers of America. And they know what they are getting. They are getting a good service. And in fact it just ain't going to happen.

Mr. ANNUNZIO. We will close the hearing at this point because they have started under the 5-minute rule.

I have tried hard to meet the October 28 deadline. I apologize that Mr. Grassley left. I don't know whether everybody realizes the number of lawsuits that can be started on the 28th. And that is the reason I was so anxious to mark up the bill today with the cooperation of the committee.

I will recite the parliamentary situation when the chairman finds himself under the new rules, the 5-minute rule started. It is 1 o'clock, so I am guessing now that we could finish this bill by 3 o'clock, take up another bill. So I would like to adjourn the meeting with this understanding, that we will try, the staff will try to have six people here so we can mark up this bill this afternoon the minute we go into general debate on the next bill which will be somewhere around 3 o'clock.

So let's play it by ear until 3 o'clock.

And before I conclude, I want to thank each and everyone of the witnesses for the contribution you have made this morning.

We have reformed this place to the point where I am just happy we are able to function as well as we are.

[The following information was submitted for inclusion in the record.]

Statement of
The Consumer Bankers Association
Before the
Subcommittee on Consumer Affairs
House Banking, Currency and Housing Committee
Regarding Proposals to Amend Section 167
of the Truth-in-Lending Act

October 23, 1975

Mr. Chairman:

The Consumer Bankers Association appreciates this opportunity to present to the Committee our concern with regard to the serious problems caused to credit card creditors in many states due to the discount provisions of new Section 167 of the Truth-in-Lending Act. Section 167 was added to the Truth-in-Lending Act by Public Law 93-495 and becomes effective on October 28, 1975.

In adding Section 167 to the Truth-in-Lending Act, Congress was reacting to the practice of many credit card issuers of prohibiting merchants that use a credit card plan from offering a discount to those customers that pay in cash rather than by presentation of a credit card. To prevent the continuation of that practice, Section 167(a) provides, in relevant part, that "the card issuer may not, by contract or otherwise, prohibit (the) seller from offering a discount to a cardholder to induce the cardholder to pay by cash..."

Congress was aware that the type of discount contemplated by Section 167(a) would be treated as a finance charge for purposes of the disclosure provisions of the Truth-in-Lending Act, and Congress attempted to remove the disclosure requirement by adding Section 167(b) which provides that the amount of the discount offered by credit card merchants to cardholders to induce cardholders to pay by cash will not be considered as a finance charge for purposes of the Truth-in-Lending Act if the discount is not in excess of 5%, if the discount is offered to all prospective buyers and if the availability of the discount was disclosed to all prospective buyers in accordance with Regulations of the Board of Governors of the Federal Reserve System.

The final Regulations of the Board of Governors issued under the Fair Credit Billing Act require card issuers that currently prohibit cash discounts in their merchant contracts to notify the merchants that the contractual prohibition is no longer effective. Thus, the regulatory scheme created by Section 167 and its implementing regulations prevents card issuers from prohibiting cash discounts and also forces card issuers to advise current merchants that they may employ cash discounts even though discounts are prohibited under existing

contractual arrangements between the merchants and the card issuer.

The unfortunate aspect of Section 167 is that it fails to come to grips with the fact that the amount of the discount offered by merchants to induce cash payment would, in many states, be treated as interest or a finance charge for purposes of determining conformity of applicable credit card transactions with the usury or consumer loan rate limitation statutes of many states. In such states, the cash discount contemplated by Section 167 would bring merchants and/or credit card issuers alike into serious violations of local law.

In preparation for this statement, our Association asked counsel for the First National Bank of Memphis to research the consumer credit laws of all 50 states to try to determine which states have statutes which would create problems for card issuers if Section 167 becomes effective on October 28, 1975, in its current form. The laws of many states are such that a final determination could be made only by litigation, but it is the belief of our attorneys that this is a reasonable breakdown:

Yes, Do Have A Problem	Uncertain, But Probably Yes	Probably Not
Alaska	Alabama	California
Arkansas	Arizona	Florida
Colorado	D. C.	Georgia
Connecticut	Indiana	Hawaii
Delaware	North Carolina	Idaho
Illinois	South Dakota	Iowa
Maryland		Kentucky
Massachusetts		Maine
Mississippi		Michigan
Montana		Minnesota
Nevada		Missouri
New York		Nebraska
North Dakota		New Hampshire
Pennsylvania		New Jersey
Tennessee		New Mexico
Texas		Oklahoma
Virginia		Ohio
Washington		Oregon
Wisconsin		Rhode Island
		South Carolina
		Utah
		Vermont
		West Virginia
		Wyoming

(If surcharges were promoted by Congress in the same fashion that discounts are promoted by Section 167, most of the states in the right column would move to the left.)

From this background, it can be seen that credit card issuers that are subject to state law that would categorize a cash discount as interest, finance charge or time price differential are put in an absolutely untenable position by Section 167. On the one hand, Federal law and regulation requires that they not,

"by contract or otherwise" prohibit a seller from offering a discount. On the other hand, State law treats any such discount as interest and, therefore, card issuers would violate the local law if merchants offer cash discounts.

There are three possible solutions to this paradox. First, credit card issuers could insist upon indemnification provisions from their merchants protecting the issuer against losses and claims resulting from a violation to the State's finance charge or interest ceiling legislation. In states with criminal sanctions for violation of maximum rate structures, the indemnification would be of arguable validity. In all states, the indemnification is only as good as the credit of the indemnifying merchant. This credit risk varies, of course, but the risk would be particularly disquieting in states such as Massachusetts where a violation of small loan limitations can result in the absolute avoidance of loans by consumers. Finally, indemnification provisions are completely ineffective with respect to those merchants who are not contractually bound to the applicable bank.

The second possible solution would involve amendments to the applicable legislation of affected states. Such amendments would, in effect, provide that the discounts offered to cash

customers are not to be treated as interest or finance charges for purposes of the rate limitations on such charges. Since the 5% discount promoted by Section 167 equates to an Annual Percentage Rate of 60% or greater for the card user who pays the card issuer for a discounted purchase in 30 days or less, it is almost certain that state legislators would instinctively react against modification of local law to permit a 60% finance charge. This second solution would, therefore, be extremely difficult to obtain.

The remaining solution is a preemption of applicable state law by Federal action. Since the discount concept was a creation of Congress and since a fair implementation of Section 167 requires a preemption, we strongly support, and believe creditors are entitled to, a Federal preemption of those state laws which would treat the discount contemplated by Section 167 as finance charge or interest. The form of legislation attached to these comments is one form of corrective Federal legislation that would preempt state laws to the extent that such laws would treat the discount charged by merchants as an interest or finance charge. The bill would accomplish three goals:

1. Free card issuers in certain states from the intolerable situation of being in jeopardy of

violating their state laws if their compliance with Section 167 of the Truth-in-Lending Act leads to its logical results.

2. Enable card-honoring retailers in certain states to take advantage of the options made available to them under Section 167 without fear of violating their state laws.

3. Help to insure that retailers to not take discounts in excess of 5%, by permitting card issuers to contract with their member merchants to prohibit such excessive discounts.

Again, we appreciate the opportunity to give our Association's views to this Subcommittee, and we would like to conclude our statement by urging the Subcommittee's support for legislation which would preempt those State laws which would treat the discount contemplated by Section 167 of the Truth-in-Lending Act as finance charge or interest. We suggest that the proposed legislation attached to this statement would accomplish this purpose.

Attachment

EXHIBIT C

SUGGESTED BILL TO PREEMPT STATE SMALL LOAN LAWS

1. Section 111(b) of the Truth-In-Lending Act (15 U.S.C. 1610(b)) is amended by striking out the first word thereof and inserting in lieu thereof the following: "Except as specified in sections 167(c) and 167(d), this."

2. So much of section 306 of Title III of Public Law 93-495 as adds section 167 to the Truth-In-Lending Act is amended by adding the phrase "not in excess of 5 per centum" after the first usage of the word "discount" in subsection (a) of said section 167.

3. So much of section 306 of Title III of Public Law 93-495 as adds section 167 to the Truth-In-Lending Act is amended by adding new subsections (c) and (d) to said section 167 providing as follows:

"(c). To the extent that the laws of any State relating to the types, amounts or rates of charges, or any element or elements of charges, permissible under such laws in connection with the extension of credit would treat the amount of any discount that does not, pursuant to subsection (b), constitute a finance charge as determined under section 106, as a charge, however denominated, to be considered in determining the compliance of the applicable transaction with such laws, such laws are not consistent with the provisions of this section and are hereby annulled to the extent of the inconsistency.

"(d). The laws of any State relating to the types, amounts or rates of charges, or any element or elements of charges, permissible under such laws in connection with the extension of credit are inconsistent with the provisions of this section and are hereby annulled to the extent that such laws: (i) would treat the amount of any discount of the type contemplated by subsection (a) as income received by or attributable to the card issuer, (ii) would require the card issuer to include the amount of such discount as part of a time price differential or any other charge with respect to the extension of credit, or (iii) would, in any other way, hold the card issuer accountable for either the existence or the amount of such discount."

[Whereupon, at 1 p.m., the subcommittee hearing was adjourned.]

DATE DUE